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Recent Developments in Aviation Case Law

Robert J. O'Connell

RECENT DEVELOPMENTS IN AVIATION CASE LAW

ROBERT J. O'CONNELL*

I. CASES INVOLVING ACTIONS AGAINST COMMON CARRIERS

PERHAPS THE LAST chapter of *The Right Stuff*[1] was played out in the courtroom testimony of Frank Borman and Scott Crossfield in *Arnold v. Eastern Airlines, Inc.*[2] Borman, President and Board Chairman of Eastern, testified that there was nothing improper in the action of the Eastern Airlines crew in shutting off the terrain warning alert[3] shortly before Flight 212 crashed into the ground three miles short of the runway at Charlotte, and that an extraneous conversation among the crew, recorded on the cockpit voice recorder, was not unusual or unsafe. Crossfield, former Vice-President of Eastern, testified that, in the words of the court, "such conduct is both ill-advised and indicative of a fatal complacency."[4] The court found the crew guilty of gross negligence in the numerous omissions and lapses of duty described in the opinion.[5]

Defendant Eastern contended that the air traffic control system's failure to monitor the approach of Flight 212 to the

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* Robert J. O'Connell Ph.B. (Loyola-Chicago); J.D.(Georgetown); LL.M. (Int. Law) (New York University); Professor of Law, John Marshall Law School (Chicago); Admitted to practice in the District of Columbia and Wisconsin.

[1] T. Wolfe, THE RIGHT STUFF (1979).

[2] 16 Av. Cas. 17,592 (W.D.N.C. Mar. 14, 1980).

[3] A terrain warning alert displays a warning light and emits a piercing whistle whenever the descent is within 1,000 feet of the ground. *Id.* at 17,594.

[4] *Id.* at 17,595.

[5] *Id.* at 17,604.

runway, with respect to its height above the ground, made the United States negligent.[6] Eastern also claimed a failure of duty by the United States in its omission to warn Flight 212 of the dangerously low altitude observed by the approach controller operating from the ARTS (automated radar terminal system, which associates alphanumeric computer data with radar responses) and from the TRACON (terminal radar approach control, in the radar room and in the tower cab).[7] After examining the FAA manuals and directives, the experience of pilots and controllers, and the nature and purpose of the ARTS III in use at the time of the crash of Flight 212, the court held that there was no duty on the part of the United States to use the ARTS in such a fashion.[8] The court found that there was no breach of duty to warn of a known danger, since the air traffic controllers had not observed the danger to Flight 212 until it had already crashed.[9] The court further observed that the danger to the flight was so great as a result of the negligence of the crew that no warning would have avoided the disaster.[10]

II. Cases on Product Liability

Those who may have feared that the trend of products liability law would eventually produce atrophy of the human brain may take some comfort from the decision in *Kroon v. Beech Aircraft Corp.*[11] In that case, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of a defendant manufacturer when the plaintiff, an experienced pilot, attemped to fly an airplane with a pin-type gust lock[12] in place in the control column. Even though he was familiar with the

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[6] *Id.* at 17,600.
[7] *Id.*
[8] *Id.* at 17,602-03.
[9] *Id.* at 17,603-04.
[10] *Id.* at 17,604.
[11] 628 F.2d 841 (5th Cir. 1980).
[12] A gust lock "is designed to prevent damage to an airplane's control system by keeping the movable surface of the airplane—the rudder, the elevators, and the ailerons—from moving in windy conditions." *Id* at 892. When the gust lock is engaged, it is not possible to get the aircraft off the ground, though it can be maneuvered while on the ground. *Id.*

airplane and the gust lock system, the pilot commenced a take-off roll without removing the gust lock.[13] After realizing part way down the runway that he could not operate the control system, the pilot steered the plane off the runway and damaged it.[14] The court rejected plaintiff's assertion that the design of the gust lock or the manufacturer's failure to warn users of its dangers contributed to the accident.[15] The court held that summary judgment was appropriate because a reasonable jury could not disagree that it was solely the plaintiff's conduct that proximately caused the injury.[16]

A dissent by Judge Tate lent credence to plaintiff's view that the design of the gust lock might have been found by the jury to be defective, because the manufacturer was aware of numerous accidents of a similar kind and had designed a fail-safe gust lock system that was not installed on this plane, even though the NTSB had indicated that remedial action was required to correct gust locks of the type here involved.[17] Judge Tate stated further that the "patent danger doctrine," which protects manufacturers who sell negligently designed machines, should be rejected and that the jury should be permitted to determine the apportionment of damages under Florida's comparative negligence rule.[18]

Of similar thrust is *Stevens v. Cessna Aircraft Co.*,[19] in which plaintiff advanced the theory that, had the defendant manufacturer posted the capacity of the aircraft in pounds of cargo and number of passengers, the decedent, who was one of three passengers, could have made his own determination that the airplane was overloaded and thereby would not have relied on the pilot's weight calculations.[20] The court rejected the plaintiff's argument on the ground that such a warning to a passenger would be ineffective because "[w]hether the plane

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[13] *Id.*
[14] *Id.*
[15] *Id.* at 893-94.
[16] *Id.*
[17] *Id.* at 894.
[18] *Id.* at 895.
[19] 115 Cal. App. 3d 431, 170 Cal. Rptr. 925 (Ct. App. 1981).
[20] 115 Cal. App. 3d at 433, 170 Cal. Rptr. at 926.

can fly safely with a given total weight of passengers depends upon too many additional factors for a passenger to make an informed and intelligent judgment from such a notice."[21] In addition, the court said that the passenger "necessarily depends upon the skill and judgment of the pilot"[22] and it would be impossible to provide meaningful data to the passengers on all that is required for the safe operation of the airplane.[23] A contrary holding would imply that a manufacturer has a duty to post other meaningful information in the passenger compartment "to enable the passengers to second guess the pilot," which ultimately would not be in the interests of air safety.[24]

Trust Corp. of Montana v. Piper Aircraft Corp.,[25] was a "second collision" case.[26] Plaintiff's decedent had died in the crash on takeoff of his 1965 Piper airplane. His personal representative brought the action on a theory of strict liability in tort, alleging that, while the original accident may have been caused by the decedent's negligence in the operation of the airplane, decedent's injuries were fatally enhanced by a defect in the aircraft.[27] In a striking decision, the district court accepted the concept that a second collision case could be grounded on the theory of strict liabilty in tort, providing the plaintiff was able to show: (1) that the crash was survivable; (2) that, in this case, the absence of a shoulder harness system in the plane was an unreasonably dangerous defect; and (3) that the defect caused decedent's enhanced injuries.[28]

The district court then held that the Montana Supreme Court, if confronted with the question, would adopt the doctrine of "comparative fault" in product liability actions.[29] The court described that proposition in this way: "Essentially, the

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[21] *Id.* at 433-34, 170 Cal. Rptr. at 926. None of those factors which might have affected the calculation in this case were mentioned in the opinion.

[22] *Id.*

[23] 115 Cal. App. 3d at 434, 170 Cal. Rptr. at 926.

[24] *Id.*

[25] 506 F. Supp. 1093 (D. Mont. 1981).

[26] "This case has been dubbed a 'second collision' action in which the defect, although not causing the crash, allegedly enhanced the injury." *Id.* at 1094.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 1095.

doctrine recognizes that defendants are strictly liable for injury caused from defective products, except that damages, if any, are reduced in proportion to plaintiff's own contribution to his loss or injury. Product liability defendants may to this extent present evidence of plaintiff's culpable conduct as a partial defense."[30]

In this holding the court supported the view expressed in *Daly v. General Motors*,[31] that there would be no dilution of the fundamental goals of strict liability in tort and that plaintiffs would continue to be relieved of the burden of showing defendant's negligence but would suffer the loss of so much of their potential recovery as is ascribable to the plaintiffs' own negligence.[32] The court noted that the majority of states considering the problem have adopted the rule of comparative negligence in strict liability cases, notwithstanding the critical rejection of the attempt to blend rules of negligence with the theory of strict liability in tort. This criticism, the court suggested, rested on an insistence on precise and fixed definitions of legal concepts, rather than upon any practical difficulty.[33]

In an action based on strict liability in tort, the court in *Aetna Casualty and Surety Co. v. Jeppesen & Co.*,[34] held that it was not clearly erroneous for the trial court to have found Jeppesen's instrument approach charts defective. Aetna alleged that while Jeppesen's charts were accurate, the scale of the "plan" view[35] of the approach to Las Vegas Airport was five times smaller than the scale of the "profile" view.[36] The scale of the juxtaposed plans on the approach chart, therefore, appeared to be the same at first glance.[37] The appellate court then found that the district court was in error in concluding

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[30] *Id.*

[31] 20 Cal. 3d 725, 975 P.2d 1162, 144 Cal. Rptr. 380 (1978).

[32] 506 F. Supp. at 1095.

[33] *Id.*

[34] 642 F.2d 339 (9th Cir. 1981).

[35] The plan view is the "view from the top of an object." J. FOYE & D. CRAIN, AIRCRAFT TECHNICAL DICTIONARY 130 (1978).

[36] 642 F.2d at 342. The profile view is a "side view . . . a view of anything in contour." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1134 (2d College ed. 1972).

[37] 642 F.2d at 342.

that, while the pilots of the plane had relied on the graphic chart and had been misled into believing that they were free to fly at an altitude of 3,100 feet, they were not negligent in omitting observation of the printed material showing the correct data about the chart.[38] The court concluded that the damages should be apportioned.[39]

In *Pioneer Seed Co. v. Cessna Aircraft Co.*,[40] a federal district court held Cessna negligent in the manufacture of a Model 441 aircraft whose nosewheel collapsed under normal operating conditions.[41] The court added that use of the part which had failed (a nosegear trunnion lug) was a design defect, as was the use of a certain steel washer which cut into the lug's radius.[42]

In *Meil v. Piper Aircraft Corp.*,[43] a pilot was injured in the crash of a spraying plane manufactured by defendant. Plaintiff sued, alleging both negligence in design and manufacture, and strict liability in tort.[44] First, he argued that the negligence of the manufacturer in fabricating a cutter bar which was attached to the landing gear and meant to sever wires with which the plane might otherwise collide, was the cause of his accident.[45] The cutter bar was shown to have been manufactured from steel too soft to cut wire. The court held that there was adequate evidence to support this postulate.[46] Second, the plaintiff argued that his injuries were enhanced by the failure of the manufacturer to incorporate into the design a safety belt with a latch sufficiently easy to operate to permit plaintiff to release himself from the overturned airplane before he was seriously burned by the fire following the crash.[47] The court also upheld the verdict and judgment below

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[38] *Id.* at 343.

[39] *Id.* at 343-49. The court of appeals applied California law to apportion damages on the basis of comparative fault. *Id.*

[40] 16 Av. Cas. 17,941 (E.D. Va. Aug.25, 1981).

[41] *Id.* at 17,943.

[42] *Id.*

[43] 658 F.2d 787 (10th Cir. 1981).

[44] *Id.* at 788.

[45] *Id.* at 789.

[46] *Id.* at 789-90.

[47] *Id.* at 790.

as to this claim.[48]

In *LaBelle v. McCauley Industrial Corp.*[49] the First Circuit Court of Appeals held negligent the manufacturer of a propeller which cracked and caused damage to the aircraft. Liability was based on the failure to warn the airplane's owner of a defect or dangerous condition in its product.[50] The court upheld the jury's finding of negligence, even though a service bulletin published by the manufacturer about a year and a half before the accident required destruction of the part and its replacement. The publication took place after the time of an overhaul of the particular propeller by an authorized repair station.[51] The court reasoned that the jury was warranted in finding that such indirect notice constituted an inadequate method of warning and thus a negligent failure to warn.[52]

In *Hersch v. Rockwell International Corp.*,[53] a federal district court applied Kentucky law in a wrongful death action based upon a theory of design defect, holding that Kentucky requires "precisely focused proof on both design defect and causation" and that merely "proving that the product was involved in an accident is insufficient" as a basis for liability.[54] The court also held as insufficient the evidence that the defendant could have made some modifications to the design of its airplane which might have prevented the accident. The court specifically stated that plaintiff's proof that defendant's design failed to meet a spin-recovery design criterion known as the "tail-damping power factor" was merely proof that there was a possible alternate design.[55] The court found further that the failure of defendant to spin-test the airplane was not negligence, and that the Federal Aviation Administration

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[48] *Id.* at 790-91. In the trial court, the jury entered a general verdict for the plaintiff. *Id.* at 789.

[49] 649 F.2d 46 (1st Cir. 1981).

[50] *Id.* at 50. The defect involved the lack of a needed rounding and polishing operation on the propeller hub, causing fatigue cracks to form. *Id.* at 49.

[51] *Id.* at 49.

[52] *Id.*

[53] 16 Av. Cas. 17,960 (S.D. Ohio Aug. 11, 1981).

[54] *Id.* at 17,961.

[55] *Id.*.

does not require the airplane in question to be spin-tested.[56]

In *Ferguson v. Cessna Aircraft Co.*,[57] plaintiffs' representatives brought wrongful death actions against Cessna Aircraft Company after the crash of a Centurion 210L whose wing fell off over the Caribbean.[58] The plaintiffs' evidence indicated that wing flutter was the cause of the detachment and that the flutter resulted from a loose aileron cable, which permitted the aileron to move freely and, hence, to flutter. The same witness testified that the flutter would not have occurred if the ailerons had been "statically mass balanced," instead of being designed to rely on tension established by the aileron cable to keep them from fluttering.[59] The witness testified that this constituted a design defect. The court held that plaintiffs "showed that the airplane failed to perform as safely as an ordinary consumer would expect when using it in an intended or reasonably foreseeable manner",[60] that this type of design defect gave rise to strict liability in tort, and that it was not necessary, therefore, for plaintiffs to prove Cessna was negligent.[61]

III. Cases Involving Forum Non Conveniens

In the long-awaited decision by the Supreme Court in *Piper Aircraft Co. v. Reyno*,[62] the judgment of the district court was affirmed and that of the court of appeals reversed. In *Reyno* the actions against Piper were eventually filed in the Middle District of Pennsylvania, where the motion to dismiss for forum non conveniens was made and granted by the district court. The court of appeals reversed. The Supreme Court reversed the court of appeals, primarily on the ground that it was error to allow the plaintiffs to resist the motion to dismiss for forum non conveniens merely by showing that the substantive law of the alternative forum would be less favorable

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[56] *Id.*.
[57] 16 Av. Cas. 18,008 (Ariz. Ct. App. Oct. 14, 1981).
[58] *Id.* at 18,009.
[59] *Id.*
[60] *Id.* at 18,010.
[61] *Id.*
[62] 102 S. Ct. 252 (1981).

to the plaintiffs than that of the original forum.[63] The Supreme Court held that the possibility of change in substantive law should not ordinarily be given conclusive or even substantial weight in the forum non conveniens inquiry.[64] The position of the Supreme Court was based, not only on prior decisions of the Court, but on reason as well. The Court asserted that both the need for flexibility, as well as the value of the forum non conveniens rule, might be lost altogether under the interpretation applied by the court of appeals, because in the majority of cases, plaintiffs choose the forum on the basis of its advantageous law.[65] The Court added that the practical problems created by the court of appeals rule might be insuperable because the analysis of whether the change of forum would be advantageous would be critical and inordinately complex.[66] Finally, the Court thought that the view of the court of appeals would cause further congestion in the courts of the United States since American law presumably is always more favorable to the plaintiff than foreign law would be.[67]

The Supreme Court instead approved application by the district court of the public and private interests standards established in *Gulf Oil Corporation v. Gilbert*,[68] including the district court's holding that the resident's or citizen's choice of forum might be given greater weight than the choice of forum by a nonresident or foreign plaintiff.[69] The Court reasoned that, when the home forum of the plaintiff has been chosen, it is reasonable to assume that this choice is convenient, but when the choice is that of a foreign plaintiff, such an assumption of convenience is not so reasonable.[70] The Supreme Court also approved the district court's holding that the private interests analysis favored suit in Scotland, the site of the crash, partially because "the problems posed by the inability to im-

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[63] *Id.* at 261.
[64] *Id.*
[65] *Id.* at 262-63.
[66] *Id.* at 263.
[67] *Id.* at 263-64.
[68] 330 U.S. 501 (1947).
[69] 102 S. Ct. at 265-66.
[70] *Id.*

plead potential third party defendants clearly supported holding the trial in Scotland."[71]

Observers of the attractive advertisements of Singapore Airlines appearing in the daily press,[72] as well as the airline's attorneys, will be cheered by the decision of the New York County Special Term of the Supreme Court of New York in *Aboujdid v. Gulf Aviation Co.*[73] The court in *Aboujdid* held that New York was an appropriate forum for the trial of actions against Singapore Airlines and others for personal injuries suffered by a group of French, English, Israeli, Canadian and American passengers, hijacked while on board an Air France jet en route from Tel Aviv to Paris. An action against Air France, brought in Illinois by many of the same passengers who were rescued in the famous Entebbe raid, was dismissed by the Illinois Supreme Court in *People ex. rel Air France v. Giliberto* on the ground of forum non conveniens.[74]

In *Aboujdid*, Singapore Airlines was accused of negligence in screening passengers in Bahrain, some of whom were alleged to be the hijackers, thus allowing the hijackers eventually to board the Air France plane without further search when they changed planes in Athens.[75] In its search for an appropriate forum, the court recited the criteria that controlled in an application of the rule in *Varkonyi v. S. A. Empresa de Viacao Airea Rio Granderse (Varig).*[76] Included in this recitation was the statement from *Gulf Oil Corp. v. Gilbert,*[77] that the plaintiff's choice of forum should not be disturbed unless the balance is strongly in favor of the defendant.[78]

Much of the rest of the *Aboujdid* opinion constitutes an examination of the superiority of one forum over the other fo-

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[71] *Id.* at 267.

[72] *See* N.Y. Times, November 30, 1981.

[73] 108 Misc. 2d 175, 437 N.Y.S.2d 219 (N.Y. Sup. Ct. 1980), *aff'd* 448 N.Y.S.2d 427 (N.Y. App. Div. 1982).

[74] 74 Ill.2d 90, 383 N.E.2d 977 (1978), *cert. denied*, 441 U.S. 932 (1979).

[75] *Id.* at 979.

[76] 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968).

[77] 330 U.S. 501 (1947).

[78] 437 N.Y.S.2d at 221.

rums that might be selected by the plaintiff or to which the case could migrate if it were dismissed in New York. The court rejected all the potential forums except the United Kingdom and Bahrain and then concentrated upon the appropriateness of the United Kingdom (U.K.). The court noted that Singapore Airlines operated both in New York and the U.K., but that none of the plaintiffs were U.K. residents, while four of the plaintiffs were New York residents.[79] The discovery procedures of the U.K. were compared to those of New York and the United States and were found more restrictive. The court examined the convenience of the two forums from the point of view of international witnesses and concluded that it would be just as convenient for witnesses to come to New York as it would be to come to the United Kingdom, and perhaps less expensive.[80] Finally, the court noted that much legal work already had been done in New York and that most of the passengers had begun their ill-fated journey in New York. For these reasons the motion to dismiss for forum non conveniens was denied.[81]

The Texas Supreme Court, in *Helicopteros Nacionales de Columbia v. Hall*,[82] affirmed the dismissal of a wrongful death action against the Columbian helicopter company which arose out of a crash in Peru in which four persons were killed. The supreme court concluded that the court of civil appeals improperly restricted the scope of the Texas long-arm statute.[83] The supreme court held that the Texas long-arm statute reaches to the limits permitted by the United States Constitution; therefore, the court analyzed the facts in the case to determine if exercise of jurisdiction by a Texas court would be violative of due process.[84] Examining the contacts of the defendant with Texas in light of recent United States Supreme Court decisions on personal jurisdiction, the state supreme court concluded that the assertion of jurisdiction over the Co-

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[79] *Id.* at 220-21.
[80] *Id.* at 221-22.
[81] *Id.* at 222.
[82] 16 Av. Cas. 18,389 (Tex. Sup. Ct. 1982).
[83] *Id.* at 18,391. *See* VERNONS ANN. TEX. STAT. art. 2031b (West 1981).
[84] 16 Av. Cas. at 18,391-92.

lombian helicopter company was unconstitutional.[85]

The other side of this coin may be seen in *Adipaz, Ltd. v. Swiss Air Transport, Ltd.*,[86] in which the trial court dismissed, under forum non conveniens, an action in New York for property damage to cargo arising from an accident at Chicago-O'Hare International Airport, even though the defendant maintained an office in New York. The court relied on the fact that witnesses could be residents of other forums.[87]

The plaintiff responded to defendant's motion to dismiss on grounds of forum non conveniens in *Grodinsky v. Fairchild Industries, Inc.*,[88] by suggesting that the court transfer the case instead to the district of Maryland. The tranfer took place and defendant moved again for dismissal on the grounds of forum non conveniens.[89] Plaintiff argued that such a motion was barred by the earlier decision in the transferor court, but the Maryland district court held that the order, under section 1404(a) of 28 U.S.C., transferring an action to another district has no res judicata effect. The Maryland court was therefore free to entertain the motion to dismiss on the same grounds.[90]

The court went on to hold that the action should be dismissed because the Canadian accident involved Canadian plaintiffs and a Canadian owner of the aircraft. The only connection with the United States and the district of Maryland was that the defendant manufacturer was a Maryland citizen and the airplane had been manufactured in Maryland twenty years before.[91] The court found that Canada had a greater interest in the outcome of the case than Maryland, and that the defendant was amenable to process in Canada and was willing to produce witnesses there.[92]

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[85] *Id.* at 18,392-93.
[86] 16 Av. Cas. 17,580 (N.Y. Sup. Ct. May 15, 1981).
[87] *Id.*.
[88] 507 F. Supp. 1245 (D. Md. 1981).
[89] *Id.* at 1247-48.
[90] *Id.* at 1248.
[91] *Id.* at 1249-50.
[92] *Id.* at 1251-52.

In *Kahn v. United Technologies Corp.*,[93] some of the actions arising from the 1978 crash of a Sikorsky helicopter in the North Sea were brought in the Connecticut circuit court, after dismissal from the federal court was affirmed on the ground of forum non conveniens.[94] The Connecticut Superior Court then entertained defendant's motion to dismiss on the same ground and found that it had the power to dismiss conditionally, just as the federal court had done, based on the defendant's amenability to suit in Norway, the site of the accident.[95] The court then examined the factors and circumstances affecting dismissal and concluded that the weight of those factors was in favor of retention of jurisdiction.[96] The court seemed influenced primarily by the fact that the helicopter was manufactured in Connecticut, the presence there of experts who examined the wreckage, and the interests of Connecticut in the outcome of a products liability case involving a product certified by the United States.[97]

The California appellate decision in *Hemmelgarb v. Boeing Co.*[98] illustrates similarities between the process by which a court decides whether to dismiss a case on forum non conveniens grounds and the process by which a court decides what law shall apply. It also demonstrates the agony of spirit which seems to exude from opinions in which courts make these decisions through a scrupulous, point-by-point examination of the elements entering into the choice. The similarity is so significant that strict attention is required to avoid confusion with cases in the other field. In *Hemmelgarb*, the court was asked whether the actions brought in California ought to be dismissed for forum non conveniens. The actions arose after a Boeing 737 operated by Pacific Western Airlines crashed as the pilot attempted to abort the landing upon seeing a snow-sweeper on the runway.[99] The thrust reversers, which

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[93] 16 Av. Cas. 17,651 (Conn. Super. Ct. March 3, 1981).
[94] *Id.* at 17,652.
[95] *Id.*
[96] *Id.* at 17,652-53.
[97] *Id.*
[98] 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980).
[99] 106 Cal. App. 3d at 583, 165 Cal. Rptr. at 193. Pacific Western Airline was not

had already been extended, failed to retract on the "go-around" and the plane crashed.[100] The Canadian municipality operating the airport was responsible for sweeping the runway and the Canadian air traffic controller was responsible for alerting the sweeper of the imminent landing of aircraft.[101]

The court catalogued the usual grounds upon which the decision to dismiss for forum non conveniens is made, emphasizing that the possibility of a larger damage award in California was not an acceptable basis for such a decision.[102] The only connection between California and the accident was the state's position as the residence of the manufacturer of certain thrust reverser components designed by Boeing in California. The court acknowledged the interest of California in litigation concerning a resident manufacturer, but added that there was no possibility of satisfying the interests of every state in every case of this kind.[103] The court concluded, largely based on the presence of witnesses in Canada and the amenability to process of certain defendants exclusively in Canada, that Canada was a more convenient forum. The case was, therefore, dismissed.[104]

A federal district court in *Orion Insurance Co. v. United Technologies Corp.*[105] followed *Gulf Oil Corp.* v. *Gilbert,*[106] in requiring the weighing of the public interests of the states involved and the private interests of the litigants, including the strong interest of the plaintiff who chose the forum.[107] The accident arose out of a crash in the North Sea, off the coast of the United Kingdom, of a helicopter manufactured by a Connecticut defendant.[108] Defendant's principal place of business was Connecticut, but the business was a Delaware corporation. Plaintiff was the insurer of the aircraft.

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served with process.

[100] *Id.*

[101] *Id.*

[102] 106 Cal. App. 3d at 586, 165 Cal. Rptr. at 195.

[103] 106 Cal. App. 3d at 589, 165 Cal. Rptr. at 197.

[104] 106 Cal. App. 3d at 590-91, 165 Cal. Rptr. at 197-98.

[105] 15 Av. Cas. 18,061 (S.D.N.Y. 1980).

[106] 330 U.S. 501 (1947).

[107] 15 Av. Cas. at 18,061.

[108] *Id.*

Plaintiff filed another action against defendant in the United Kingdom and acknowledged that the action commenced in New York was intended to protect plaintiff's strict liability action, because that claim was unavailable in the U.K.[109] The court saw at once that New York had no connection with the suit, and acknowledged that a greater interest in the outcome of the litigation lay either in Connecticut or the United Kingdom.[110] The court held that public interest in the outcome of the suit outweighed the plaintiff's private interest in maintaining suit in New York since all of the technical data touching the accident were either in Connecticut or the U.K.[111] Insofar as the private interests of the litigants were concerned, the court concluded that, though a clear advantage flowed to plaintiff from suit in New York based on strict liability in tort, the inconvenience of the forum outweighed the private interest of the plaintiff.[112] The court noted that the emasculation of the whole doctrine of forum non conveniens would result from the retention of litigation merely because of the availability of better law from the plaintiff's point of view in the forum. Thus retention was precluded and the motion for dismissal was granted.

The *Gulf Oil* decision was also followed in *Dasi v. Air India*.[113] Plaintiff, a four-year old child, was traveling with her guardian from New York to New Delhi on Air India on a ticket purchased in New York. While being transported on a moving walkway at Orly Airport in Paris plaintiff caught her hand in the handrail and was injured. Plaintiffs were California residents, and brought suit in New York against Air India and Orly Airport. Both defendants moved to dismiss on the ground of forum non conveniens, a question with which the court dealt after satisfying itself that it had jurisdiction of both defendants.[114] The court reasoned that, while solicitation of business alone is not a sufficient basis for the exercise of

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[109] *Id.* at 18,062. Strict liability is presently not recognized in Great Britain. *Id.*
[110] *Id.* at 18,062.
[111] *Id.*
[112] *Id.*
[113] 16 Av. Cas. 17,308 (S.D.N.Y. Jan. 26, 1981).
[114] *Id.* at 17,309.

jurisdiction, solicitation plus sales and promotion activities carried out in a permanent office are sufficient.[115]

Among the private interests which the court examined in accordance with the criteria of *Gulf Oil,* were the sources of physical, documentary and testimonial proof. The court found that these sources of proof were more readily and more inexpensively available in Paris.[116] In addition, the court found, on the basis of expert testimony, that a New York judgment could not be enforced in France against the airport authority, but the court concluded that this fact was of questionable weight because plaintiff had chosen to run this risk.[117] The court, therefore, saw that many practical problems would be eliminated by allowing the case to be moved to Paris.

The court held that the balance of conveniences justified the transfer to Paris, the site of the accident, where a strong public interest in the outcome of the litigation existed. The court added that the French law governing the case could be more ably applied in a French court.[118] Accordingly, the case was dismissed on the conditions of consent to the French jurisdiction by the defendants, waiver of claims under the statute of limitations by defendants, and consent to satisfy any judgment rendered against the defendants in France.[119]

Pain v. United Technologies Corp.,[120] may well stand as a model for the application of the principles laid down in *Gulf Oil Corp. v. Gilbert,*[121] and *Koster v. Lumbermens Mutual Casualty Co.*[122] In *Pain,* a helicopter manufactured by defendant in Connecticut crashed in the North Sea off the coast of Norway. The helicopter was owned by a Norwegian corporation and was en route from the coast of Norway to an offshore

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[115] *Id.*

[116] *Id.* at 17,310.

[117] *Id.* at 17,310-11. The defendant produced evidence that a judgment entered against it would be unenforcable because France consigns cases brought against it to local administrative tribunals. *Id.*

[118] *Id.* at 17,311.

[119] *Id.*

[120] 637 F.2d 775 (D.D.C. 1980).

[121] 330 U.S. 501 (1947).

[122] 330 U.S. 518 (1947).

oil platform.[123] The passengers who died or were injured in the crash were French, Norwegian, British, American and dual Norwegian-Canadian citizens. The crash was investigated by a Norwegian government agency and the wreckage, as well as the investigative reports and the investigators, was in Norway.[124] All plaintiffs brought suit in the District of Columbia, though only one was an American citizen.

The court proceeded along familiar lines: first, determining the number of possible alternative jurisdictions for the action; second, systematically weighing each of the factors which the *Gilbert* decision required to be accounted for when balancing the conveniences for private parties; third, allowing a presumption of the soundness of the plaintiff's choice of forum; fourth, when the private interests are in equipoise, considering the interests of the all states involved; and fifth, if a foreign court is found more appropriate for the suit, assuring that the action will be subject to prosecution in that forum without undue prejudice or hardship to the plaintiff.[125] The court concluded that there were other forums with greater access to sources of proof than the District Court for the District of Columbia, and that the courts of Norway would be able to implead the Norwegian corporate owner of the helicopter, which would be impossible in the United States.[126] The court also found that there were no significant contacts between the accident and the District of Columbia, and that the litigation would constitute a burden on the chosen forum which it could not rightly be forced to bear.[127] The court found, too, that Norway's interest in the outcome of the litigation was greater, indicating that its law would probably apply to the case.[128] Finally, the court concluded that the suits were rightly dismissed for forum non conveniens, despite the Amer-

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[123] 637 F.2d at 779.

[124] *Id.* at 780.

[125] *Id.* at 781-84.

[126] *Id.* at 790-91. The Norwegian corporate owner of the helicopter had no contacts with the United States and was thus not subject to the personal jurisdiction of the United States courts. *Id.* at 780.

[127] *Id.* at 792.

[128] *Id.* at 793.

ican citizenship of some of the plaintiffs. The court intimated that the American citizenship of a plaintiff was only one of the private factors to be considered, and not one which entitled the plaintiff to greater consideration in its choice of forum than would be given another plaintiff.[129]

Fosen v. United Technologies Corp.,[130] also involved a wrongful death action arising out of a helicopter crash that occurred in the North Sea off the coast of Norway. The plaintiffs were five Norwegian citizens suing as personal representatives of five Norwegians killed while being transported to a mobile drilling rig owned by the Phillips Petroleum Company. The cause of the crash was undetermined.[131] Defendant United Technologies, a United States corporation, manufactured the helicopter and sold it in 1971 to defendant All Nippon Airways Co., Ltd. (ANA), a Japanese corporation which later sold the craft to a Norwegian company not a party to this action. ANA also had a subsidiary, ANA Americas, licensed to do business in California, Washington, and New York.[132]

The plaintiffs, suing in New York, alleged defective design, manufacture or maintenance of the helicopter and based their jurisdictional assertion on diversity of citizenship[133] and the Death on the High Seas Act (DOHSA).[134] Defendant ANA moved to dismiss the suit for lack of personal jurisdiction. ANA Americas moved for summary judgment, or in the alternative, dismissal for failure to state a claim upon which relief could be granted, and defendant United Technology pleaded forum non conveniens.[135] ANA's only New York contact was its financial representative, located there to negotiate loans with banks in the city. The plaintiffs alleged that this fact indicated that ANA was "doing business" under the New York

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[129] *Id.* at 797-98.
[130] 484 F. Supp. 490 (S.D.N.Y. 1980).
[131] *Id.* at 493.
[132] *Id.*
[133] 28 U.S.C. § 1332 (1976).
[134] 46 U.S.C. § 761 (1975).
[135] 484 F. Supp. at 494.

jurisdictional standard.[136]

First, the district court addressed the jurisdictional question and held that the court could not assert jurisdiction over defendant ANA based on diversity because the plaintiffs were Norwegian and the defendant (ANA) was Japanese. Diversity jurisdiction could not be maintained over foreign litigants.[137] Secondly, the court held that jurisdiction was also improper under DOHSA because the act required sufficient contacts between the United States and the transaction giving rise to the claims against ANA.[138] The court noted that this test was not met because there was no evidence of negligent design or manufacture within the United States on ANA's part, nor was the presence of an ANA Americas financial agent in New York a sufficient contact. ANA Americas' presence in three states was too insignificant a contact to make the United States ANA's "base of operations."[139] Thirdly, the court recognized that ANA Americas' summary judgment motion was granted because, even after discovery, the plaintiffs had neither presented any evidence demonstrating the existence of a genuine factual issue nor explained their inability to do so.[140]

Finally, the court granted United Technologies' motion to dismiss on the grounds of forum non conveniens on the condition that the defendants: (1) submit to jurisdiction in Norway; (2) make all witnesses and documents within their control available in the Norwegian action; and (3) pay any judgment rendered by a Norwegian court.[141] The public interest was in having "local controversies decided at home."[142] Since no element of the lawsuit was related to New York in any way, and since Norway had the substantial interest in the outcome, the court weighed the interests and dismissed the litigation.

In *Macedo v. Boeing Co.*,[143] a federal district court dealt

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[136] *Id.*
[137] *Id.* at 495.
[138] *Id.* at 495-96.
[139] *Id.* at 497.
[140] *Id.* at 501.
[141] *Id.* at 503.
[142] *Id.* at 504.
[143] 15 Av. Cas. 18,032 (D. Ill. 1980).

with and dismissed three lawsuits arising from the crash of an aircraft in Portugal. An airliner owned and operated by Transportes Aereos Portugueses (TAP) crashed on landing at Funchal Airport, killing one-hundred thirty-two persons aboard and injuring thirty-two persons. Only six of the one-hundred thirty-nine plaintiffs were Americans. Illinois, where the suit was brought, was not the residence of the American plaintiffs, and this forum bore no relation to any issue relevant to the litigation.[144]

The court granted the motion to dismiss the first suit because of the lack of diversity between all plaintiffs and the defendants, who were eight American manufacturers and TAP. The two additional actions were filed in Illinois at a later date. In one of these suits, there were two plaintiffs from Georgia, three from Florida and one from New York, while the sole defendant was TAP. In the other action, none of the plaintiffs was American, though the defendant was the American Boeing Corporation. The complaint against Boeing alleged wrongful death based upon products liability and breach of warranty, while the complaint against TAP alleged negligence.[145] Thus, the plaintiffs appeared to have cured the jurisdictional defect of the initial action.

The federal district court, in a memorandum decision, dismissed the two later actions on the ground of forum non conveniens, subject to the condition that the defendants submit to the jurisdiction of the Portuguese courts.[146] The court based its ruling on *Gulf Oil Corp. v. Gilbert*[147] because the question to be determined was whether the courts of Portugal would provide a significantly more convenient alternative forum, due to the availability of evidence and witnesses in that country. Dismissal on the basis of forum non conveniens is not proper when there exists a significantly more convenient federal forum to which the action may instead be transferred

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[144] *Id.* at 18,032.
[145] *Id.* at 18,032-33.
[146] *Id.* at 18,035.
[147] 330 U.S. 501 (1947).

under 28 U.S.C. 1404(a).[148] As the court pointed out, however, federal courts retain jurisdiction and discretion to dismiss an action when the more convenient forum is foreign.[149]

In *Macedo,* the wreckage of the aircraft, airport, witnesses, maintenance records, air traffic controllers, documents relating to the operating procedures of TAP, flight data recorder and transcripts of conversations of the crew, and official investigations and reports were all in Portugal. Moreover, defendants were willing to submit to the jurisdiction of the courts of Portugal. The fact that the aircraft was manufactured in the United States did not render the accident, involving a Portugese airline and airport, and predominantly Portuguese plaintiffs and witnesses, any less a matter of local Portuguese interest.[150] On this basis, the court found that Portugal had substantially more contact with the suits and provided a substantially more convenient forum for the "just and total" disposition of the claims of both the American and foreign plaintiffs.[151]

IV. Warsaw Convention Cases

An intriguing argument was examined and then dismissed by the court in the otherwise routine opinion offered in *Bank of Nova Scotia v. Pan American World Airways, Inc.*[152] The argument suggested by both parties was that the Hague Protocol,[153] which was signed but never ratified by the United States,[154] ought to be applied by the court because it would be applied in either Canada, the country of departure, or El Salvador, the country of destination, both of which adhere to the Hague Protocol.[155] The court found no difference in the application of the Warsaw Convention or the Hague Protocol to

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[148] 28 U.S.C. § 1404(a) (1976).
[149] 15 Av. Cas. at 18,035.
[150] *Id.* at 18,034.
[151] *Id.*
[152] 16 Av. Cas. 17,378 (S.D.N.Y. Feb. 27, 1981).
[153] The Hague Protocol is reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 324-66 (1963).
[154] 16 Av. Cas. at 17,380.
[155] *Id.* at 17,378-79.

the case because the meaning of "wilful misconduct" in the latter convention coincided with that of the former.[156] The view suggested by the parties would have created a choice of law issue, rather than a question of the application of domestic law derived from treaties and the Supremacy Clause of the United States Constitution, an interesting dichotomy, indeed.

In one of the rare recent decisions holding the Warsaw Convention applicable and limiting the liability of the carrier to the $75,000, as provided by the carrier agreement at Montreal, a New York appellate court in *Manion v. Pan American World Airways, Inc.*,[157] held the failure of the carrier to deliver a ticket to plaintiff on the first leg of a round trip from New York to Saudi Arabia, did not exclude the treaty's limitation of liability, since a ticket was delivered during an intermediate stop in Rome several hours before the continuation of her journey.[158] In reaching its conclusion that the flight was not an indivisible unit, the appellate court seemed to rely on the fact that the ticket issued by the carrier provided separate flight coupons for each leg of the trip and that the journey was interrupted by the passenger in Rome.[159]

The Warsaw Convention[160] was held inapplicable in *Adamsons v. American Airlines, Inc.*,[161] a case in which a plaintiff sought damages for personal injury claimed to have resulted from American Airlines' refusal to board her after she had made an advanced flight reservation for a trip from Haiti to New York. Plaintiff was traveling to New York for medical

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[156] *Id.* at 17,380. On the facts of the case, the court held that the deliberate omission by the defendant carrier's agent to place a parcel of gold grain into a special "valuables sack," provided by the carrier for security, eliminated the limitation of liability provided under the Warsaw Convention. *Id.* The court concluded that such an act was "willful conduct." *Id.*

[157] 80 App. Div. 2d 303, 439 N.Y.S.2d 6 (1981).

[158] 439 N.Y.S.2d at 8-9. The plaintiff was injured when terrorists attacked the plane at Rome, one of the scheduled intermediate stops on the flight. *Id.* at 7.

[159] *Id.* at 8-9.

[160] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1936), T.S. No. 876 (effective Oct. 29, 1934) (codified at 49 U.S.C. !e] 1502 (1976)) [hereinafter cited as the Warsaw Convention].

[161] 16 Av. Cas. 17,195 (N.Y. Sup. Ct. Oct. 31, 1980).

treatment of a severe illness contracted while in Haiti.[162] At trial, her expert medical witness testified that the "catastrophic consequences" of her illness could have been avoided, had the airline not refused to board her.[163] In defense, American asserted a tariff provision which permitted it to deny boarding, if such action was necessary for the safety of the plaintiff or other passengers, or if plaintiff required special assistance. American Airlines argued that its liability should be limited to $75,000 provided by the Warsaw Convention and Montreal Agreement.[164] The court affirmed the jury's verdict, finding that American was negligent in failing to gather information necessary for the accurate and informed application of its tariff provision. The court reasoned that the Warsaw Convention was inapplicable because plaintiff never became a passenger, there was no accident under the terms of the Convention, and plaintiff was not embarking or disembarking.[165]

Under the Warsaw Convention, a two year statute of limitations is applicable to actions for loss or damage to checked baggage.[166] The calculation of the two year period, however, is to be accomplished in accordance with the law of the forum.[167] In *Joseph v. Syrian Arab Airlines*,[168] the plaintiff claimed that its earlier, timely filed action tolled the statute of limitations under a New York law which so provided, in cases in which the earlier action had been terminated because of a "technical defect."[169] In *Joseph*, the court held instead that the earlier action was not terminated by reason of a technical defect, but rather because of a voluntary discontinuance by the plaintiff, a reason specifically excluded by the law permit-

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[162] *Id.* at 17,196.

[163] *Id.*

[164] *Id.* at 17,197. *See* Warsaw Convention, *supra* note 160; Agreement, C.A.B. 18900, approved C.A.B. Order No. E23680, Docket 17325, May 13, 1966, 44 CAB Rep. 819 (1966) [hereinafter cited as Montreal Agreement].

[165] 16 Av. Cas. at 17,197-98. Plaintiff was given judgment for $500,000. *Id.* at 17,198.

[166] Warsaw Convention, *supra* note 160, Art. 29.

[167] *Id.*

[168] 88 F.R.D. 530 (S.D.N.Y. 1980).

[169] *Id.* at 532.

ting the time extension.[170] More importantly, said the court, the defendants in the case were not the same as those in the earlier action and hence did not have fair notice of the plaintiff's action.[171] The existence of such notice was the factor on which the New York law permitting the extension of time was based.[172]

In *DeMarco v. Pan American World Airways, Inc.*,[173] the court held that the two-year statute of limitations did apply to an action for loss or delay of baggage, even though the claim check issued to the plaintiff did not advise of the applicability of the Warsaw Convention rules.

Following the precedent in a majority of cases, the court in *Kordich v. Butler Aviation Detroit*,[174] held that the Warsaw Convention statute of limitations continues to control, even though the defendant carrier is guilty of wilful misconduct.[175] The *Kordich* court ruled that the statute of limitations is not a provision of the Convention which "excludes or limits" liability of the carrier in accordance with the terms of Article 25(1) of the Convention, but instead is a provision which establishes a bar to the enforcement of the liability.[176]

In *Georgakis v. Eastern Air Lines, Inc.*,[177] plaintiff, a Greek seaman, sued for personal injuries arising from the crash of an Eastern 727 at Kennedy International Airport in 1975. Defendant claimed the protections of the Warsaw Convention.[178] The court held that the transportation of plaintiff was "domestic," even though an extension of the trip to Greece via Olympic Airlines was contemplated, because he was ticketed only between Baton Rouge and New York.[179] The court considered the plaintiff's inability to read English in determining the question of whether requisite notice was given, and thus

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[170] *Id.* at 533.
[171] *Id.*
[172] *Id.*
[173] 16 Av. Cas. 17,269 (N.Y. Sup. Ct. 1981).
[174] 103 Mich. App. 566, 303 N.W.2d 238 (1981).
[175] 303 N.W.2d at 239.
[176] *Id.* at 239-40.
[177] 512 F. Supp. 330, 331 (E.D.N.Y. 1981).
[178] 512 F. Supp. at 330-31.
[179] *Id.* at 334-35.

whether the Convention was applicable.[180] The court also inquired into the collateral estoppel effect of a prior adjudication against Eastern Air Lines by another Greek seaman, plaintiff's shipmate on the ill-fated plane.[181] The court held that, though the decision in the first case was interlocutory in nature, collateral estoppel still applied in *Georgakis*.[182] Thus, the holding in the first case, that the Greek seaman was not adequately notified of Warsaw's limitations, was of "extreme significance" to the plaintiff's case.[183]

The defendant in *Carriage Bags, Ltd. v. Aerolineas Argentinas*,[184] sought to avoid liability for the full amount of damages claimed for a lost consignment of goods by asserting the limitation of the Warsaw Convention. The waybill used by defendant stated, on the obverse side, merely that the convention *might* be applicable and *might* limit liability, and then referred the reader to the reverse of the form.[185] The court held that the terms on the reverse, which clearly stated the application of the Convention, were incorporated into the contract only if defendant could show that the plaintiff, who had not signed the terms on the reverse of the form in the signature blank provided, otherwise assented to the terms.[186] Since the defendant failed show plaintiff's acquiescence, the court held that the carrier would not be entitled to the protection of the Warsaw Convention.[187]

In a fifteen line opinion, decided under the Warsaw Convention, the Southern District of New York held a prism to that treaty. The plaintiff, in *Lautore v. United Airlines, Inc.*,[188] conceded that facts forming the basis of his complaint did not constitute "an accident," within the meaning of Article 17 of the Convention. In granting defendant's motion to

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[180] *Id.* at 333-34.
[181] *Id.*
[182] *Id.* at 334.
[183] *Id.* at 335.
[184] 16 Av. Cas. 17,997 (D. Colo. 1981).
[185] *Id.* at 17,997-98.
[186] *Id.* at 17,998.
[187] *Id.* at 17,999-18,000.
[188] 16 Av. Cas. at 17,944 (S.D.N.Y. 1981).

dismiss for failure to state a cause of action, the court noted that, because the event happened on a flight from Ontario, Canada, to Chicago, Illinois, the Warsaw Convention applied.[189]

V. CASES UNDER THE FEDERAL TORT CLAIMS ACT

In *Ross v. United States*,[190] a pilot and his young son were killed in the crash of the pilot's light plane when it struck electric power lines on the approach path of a runway during an instrument landing system (ILS) approach.[191] The pilot had changed his flight plan from VFR[192] to IFR[193] en route and had asked the air traffic controller for the "decision height." The controller responded instead by stating the "minimum descent altitude" to be 418 feet.[194] Decision height was actually applicable to the pilot's approach and not minimum descent altitude.[195] The altitude stated by the controller was incorrect.[196] The controller repeated the answer when the pilot asked to have the minimum descent altitude confirmed.[197] The actual, published minimum descent altitude was 560 feet above mean sea level.[198] The power lines stood at elevation of 267.75 feet above mean sea level.[199] The court noted that had the pilot maintained even the incorrect minimum descent altitude given him by the controller, he would have avoided collision with the power lines.[200] Nevertheless, the court held that "the controller's report of the incorrect

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[189] 16 Av. Cas. at 17,944.

[190] 640 F.2d 511, 515-16 (5th Cir. 1980).

[191] *See* 14 C.F.R. §§ 97.1, 97.3 (1981) for discussion of ILS.

[192] *See* 14 C.F.R. §§ 91.105-.109 (1981) for a definition of UFR.

[193] *See* 14 C.F.R §§ 91.115-.129 (1981) for a definition of IFR.

[194] 16 Av. Cas. at 517-18.

[195] *Id.* at 518. "Decision height" is defined as the altitude in feet above mean sea level at which a decision must be made during an ILS approach either to land or to discontinue the approach. *Id.* at 517 n.11. "Minimum descent altitude" is defined as the lowest altitude in feet above mean sea level to which descent is authorized on final approach on an ILS approach when no glide slope is provided. *Id.* at 513 n.1.

[196] *Id.* at 517-18.

[197] *Id.* at 517.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 520.

[minimum descent altitude] occurred at a critical time and proximately contributed to the crash of the [pilot's] plane and, therefore, constituted negligence."[201]

The court earlier concluded that, though the controller was not required by the *Terminal Air Traffic Control Manual* to state either decision height or minimum descent altitude, he had assumed such a duty when he purported to advise the pilot of correct information.[202] By giving the incorrect minimum descent altitude, the controller breached that duty.[203] The pilot's representative was denied recovery, however, because of the pilot's contributory negligence, but the son of the pilot, a passenger in the plane, was not bound by the contributory negligence of the pilot and did recover against the United States.[204]

In *Sellfors v. United States*,[205] the District Court for the Northern District of Georgia ruled that the United States could not be held liable for breach of the duty imposed by the Airport and Airway Development Act to mitigate the hazard to navigation caused by birds feeding near an airport runway. The court had earlier opined that this omission on the part of the United States was not a discretionary act.[206] In addition, the court in *Sellfors* held that the air traffic controllers were

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[201] *Id.* at 519.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 520-21.

[205] 16 Av. Cas. 17,186 (N.D. Ga. Sept. 30, 1980). Many feel this decision is an ill-advised reversal of Fireman's Fund Ins. Co. v. United States, No. C74-24A, slip op. at 4 (N.D. Ga. March 25, 1975).

[206] Fireman's Fund Ins. Co. v. United States, No. C74-24A, slip op. (N.D. Ga. March 25, 1975). *See* Dalhite v. United States, 346 U.S. 15 (1953); Fair v. United States, 234 F.2d 288 (5th Cir. 1956). Section 1718 of the Airport and Airway Development Act of 1970 provides, in part:

> (a) As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him that —
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> . . . .
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> . . . the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

49 U.S.C. § 1718(3) (1976).

not negligent in failing to warn of the birds' presence since there was no evidence that the controllers were aware of them.[207]

Plaintiff's position was that the Airport and Airway Development Act created a duty on the part of the United States, by requiring the Government to obtain assurances from operators receiving its grants, that adjoining land would not be used for incompatible purposes.[208] The court held that more than the existence of a duty is required under the Federal Tort Claims Act (FTCA), since under the Act there is the further requirement for prosecution that, under the same circumstances, a private person would also be liable under the local law.[209] The court held that the plaintiff's position, that a violation of the federal statute was negligence per se under Georgia law, had not been established in Georgia.[210] It was clear from the opinion that a private person could not become liable under the Airport and Airway Development Act, thus the requirement of the FTCA could not be fulfilled.[211]

In *Medina v. Eastern Airlines, Inc.*,[212] the court stated that federal jurisdiction rests on diversity of citizenship. It is not permissible for the court to extend its jurisdiction to a person whose citizenship is not diverse from that of the plantiff, merely to adjudicate a state claim in the same action.[213] In *Medina*, however, the jurisdiction of the district court was

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[207] Sellfors v. U.S., 16 Av. Cas. at 17,190.

[208] *Id.* at 17,188.

[209] *Id.* at 17,188-89. Section 1346(b) of Title 28 of the United States Code provides, in part, that federal district courts

> shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1976).

[210] 16 Av. Cas. at 17,189.

[211] *Id.*

[212] 502 F. Supp. 60 (D.P.R. 1980).

[213] *Id.* at 62.

based on the Federal Torts Claims Act.[214] The court noted the circuit court's previous holding that the pendent jurisdiction could be exercised over non-diverse defendants where the "anchor chain" to which the jurisdiction was made fast was a federal one, and complete relief could only be had in a federal court.[215] The court then ruled that it was appropriate to extend its jurisdiction over the non-diverse defendant, stating that federal jurisdiction over the tort claim is exclusive, and noting that the "new," non-diverse defendant was not really a new party, since it was the insurer of one of the defendants.[216]

The court, in *Foss v. United States*,[217] held that a private pilot who was approaching an airport which had a published pattern altitude of eight hundred feet mean sea level, and who was flying at or near that altitude when he struck a 1890 foot radio tower was not negligent as a matter of law.[218] The court reached its decision despite the pilot's seeming violation of the general rule in 14 C.F.R. § 91.3 providing that the pilot in command is *directly* responsible for the operation of the aircraft, and the rule in 14 C.F.R. § 91.5 requiring the pilot to familiarize himself with all available information concerning his flight.[219] The court agreed that the Federal Aviation Administration's (FAA) traffic pattern was negligently drafted and that the trial court acted properly in accepting evidence that haze and the sun's position at the time of the accident could have adversely affected the pilot's vision.[220] By distinguishing this case from others in which the pilot had a duty to know the limitations of the aircraft, or in which the pilot failed to keep a proper lookout, the court seemed to absolve the pilot of any error in failing to see the radio tower.[221] The appellate court concluded that the trial court had not applied the wrong standard in judging the pilot's conduct, and there-

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[214] 502 F. Supp. at 63.
[215] *Id.* at 62-63.
[216] *Id.* at 63.
[217] 623 F.2d 104 (9th Cir. 1980).
[218] *Id.* at 106-107.
[219] *Id.* at 106.
[220] *Id.* at 107.
[221] *Id.*

fore, affirmed the judgment below in favor of the pilot's beneficiaries.[222]

In *Thomas v. Lockheed Aircraft Corp.*,[223] an action arising from the crash of a Lockheed C-5 "Galaxy" after departure from Saigon during the evacuation of orphans and others, the question of Lockheed's right to indemnification by the United States was raised and answered in the negative. In *Thomas*, the plaintiff's decedent was an employee of the United States.[224] When Lockheed impleaded the United States as a third-party defendant, it alleged a right to indemnification on a variety of common law and contract grounds. The United States answered that, though it might have been amenable to suit under the FTCA, if negligence of its servants in the operation and maintenance of the airplane had made Lockheed liable to the plaintiff, its obligation to indemnify Lockheed was barred by the terms of the Federal Employees' Compensation Act (FECA)[225] which provides that the liability of the United States to an employee under the act is exclusive of any other statutory liability of the United States.[226] Therefore, although Lockheed was subject to tremendous liability, FECA limited the United States' liability. The government's liability could not be increased merely by bringing suit against a government contractor and having the goverment contractor bring the government in as a third-party defendant for purpose of indemnity.[227] The court, in *Thomas*, described the indemnification problem as one aspect of a larger controversy, but held that the controversy was no longer alive because the FECA is so clear on the question of the exclusiveness of its remedy.[228]

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[222] *Id.*

[223] 665 F.2d 1330 (D.C. Cir. 1981).

[224] *Id.* at 1331.

[225] *Id.* at 1331-32. *See* Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151 (1976).

[226] 5 U.S.C. § 8116(c) (1976).

[227] 665 F.2d at 1332.

[228] *Id.* Lockheed argued that the FECA did not bar a contribution action brought by a third party against the United States. The *Thomas* court answered that argument by citing Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968), which explicitly held to the contrary. The only question the *Thomas* court found unanswered by the *Murray* decision was whether an action for non-contractual indemnity, resting

In *Baird v. United States*,[229] plaintiff sought to prove the United States liable to him for the negligence of its servant in preparing a misleading sectional aeronautical chart. In *Baird*, plaintiff relied on a chart showing lights available at a certain airport and giving the length of the longest runway there, but not indicating that the lights were not on the longest runway, as plaintiff assumed. He overran the lighted runway, killing two passengers and injuring two others.[230] The court of appeals affirmed the trial court's dismissal for want of subject matter jurisdiction, holding that the decision of the Inter-Agency Air Cartographic Committee of the United States to publish data as it appeared on the sectional chart was "precisely the kind of discretionary judgment that Congress . . . meant to shield from suit" when it enacted the FTCA.[231]

In *Carter v. City of Cheyenne*,[232] the court of appeals held that the defendant City of Cheyenne, sued by the representatives of a member of the United States Air Force Thunderbirds killed in the crash of his T-38 aircraft at Cheyenne Airport, could not bring a third-party action against the United States for the negligence of the FAA in the operation of the air traffic control system. The widow of the deceased pilot sued Cheyenne for negligence in the construction, maintenance, control and supervision of the airfield runway. Cheyenne then filed a third-party action against the United States alleging negligence of the FAA because it had given the pilot incorrect data concerning the landing field conditions. The court held that the only cause of action against the United States available to the decedent's representative was under the Veterans' Benefit Act because the decedent was on active duty when he was killed.[233] Following the holdings in *Feres v.*

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upon an independent duty running from the third-party defendant, the putative indemnitor, to the third-party plaintiff, would also be barred by FECA. 665 F.2d 1332-33. The *Thomas* court held the claims of the third-party plaintiff, Lockheed, were all derivative claims, based upon the negligence of servants to the original plaintiffs. *Id.* at 1333.

[229] 653 F.2d 437, 438 (10th Cir. 1981).

[230] 653 F.2d at 438.

[231] *Id.* at 440.

[232] 649 F.2d 827, 828-29 (10th Cir. 1981).

[233] 649 F.2d at 830.

United States,[234] and *Stencel v. United States*,[235] the court determined that it would be inconsistent to deny the decedent a cause of action against the United States under the FTCA, yet permit the City of Cheyenne to bring such an action against the United States.[236]

In *Allegheny Airlines v. United States*,[237] the district court held that the date of accrual for plaintiff's cause of action against the United States was that on which the FAA made its final administrative disposition of the claim, rather than the date on which the accident occurred. Thus, the Pennsylvania Comparative Negligence Act applied to the action since its effective date was after the date of the accident, but before the date of the administrative disposition.

VI. Cases Centering on Insurance Contracts Covering Aviation Liability

In *Edmonds v. United States*,[238] the First Circuit surveyed the case of a pilot involved in an accident while operating an airplane after the expiration of his biennial flight review,[239] who was then denied indemnification by his insurer on the ground that a condition of the insurance policy was not fulfilled at the time of the accident. The court affirmed the district court's application of Massachusetts law under which it was necessary to characterize the clause in the contract of insurance relating to the biennial flight review as either a condition precedent, in which case Avemco's (other insurer's) obligation was terminated, or a warranty or representation, in which case coverage could be avoided only if the breach con-

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[234] 340 U.S. 135 (1950) (holding that the United States is not liable under the Federal Tort Claims Act for injuries to members of the armed forces sustained while on active duty and not on furlough, and resulting from the negligence of others in the armed forces).

[235] 431 U.S. 666 (1977). In *Stencel*, the serviceman sued the manufacturer of the aircraft ejection system; the manufacturer unsuccessfully cross-claimed against the United States government for indemnity based on faulty specifications.

[236] 649 F.2d at 828-29.

[237] 16 Av. Cas. 17,738, 17,739 (E.D. Pa. 1981).

[238] 642 F.2d 877 (1st Cir. 1981).

[239] A biennial flight review is required by current federal aviation regulations. It is administered by a certified flight instructor. 14 C.F.R. § 61.57 (1981).

tributed to the accident or increased the insurer's risk of loss.[240] In addition, the court of appeals supported the lower court's view that, under *Charles, Henry and Crowley, Co. v. The Home Insurance Co.*,[241] the clause in question should be characterized as a condition precedent because: (1) the statement of the insured related to the insurer's knowing decision to issue the policy; and (2) the statement was made a condition precedent to recovery under the policy, either by using those words or their equivalent.[242]

On appeal, the plaintiff contended that a later Massachusetts decision, *Johnson Controls, Inc. v. Bowes*,[243] established the rule that a breach of condition in an insurance policy allows avoidance of coverage only when the insurer shows that such breach increased the risk of loss or contributed to the accident.[244] The court, however, rejected the application of *Johnson Controls* to the case on the ground that the contract clause in *Johnson Controls* required notification by the insured of the filing of a malpractice suit against the insured, a provision which the court found had no bearing on insurability, but instead was intended to protect the insurer's intersts after a claim arose.[245] Finally, the court held that whether the contract clause in the case did constitute a condition precedent was a question of law, a holding which at first glance appears to be the product of circular reasoning, but which in fact is founded on the language in *Charles, Henry & Crowley Co.*, requiring the terms "condition precedent" or "their equivalent."[246]

The court in *Edmonds v. United States*, ignored, or was not invited to consider, the existence of a condition precedent in the form of the pilot's passage of a biennial flight review. Had the condition been considered, it might have appeared imma-

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[240] 642 F.2d at 881-82.

[241] 349 Mass. 723, 726, 212 N.E.2d 240, 241-42 (1965) (action on "Jewelers' Black Policy.").

[242] 642 F.2d at 882.

[243] 1980 Mass. Adv. Sh. 1831, 409 N.E.2d 185 (1980).

[244] 642 F.2d at 881-82.

[245] *Id.* at 882.

[246] *Id.* at 883.

terial in the formation of the contract. There is no doubt that the clause was a condition precedent, but when the nature of the biennial flight review is considered, and the ease with which it is passed is noted, it can be appreciated that the condition precedent may not go to the heart of the insurance contract. That being the case, the court could have excused the condition precedent because forfeiture would follow its enforcement. The court could have construed the clause as a covenant, for the breach of which damages, could, if proved, be recovered.

The problem remaining for a court construing a clause in the above manner would be the difficulty of determining the purpose of such an immaterial condition precedent. The purpose seems to be the maximizing of effort to avoid accidents, the same purpose served by the institution of the biennial flight review by the FAA. In any event, it is apparent that the aim of the clause is not one of the preventing liability on the contract of insurance, although that is the result of this decision.

In *United States Fire Insurance Co. v. Pruess*[247] the court held that, in a policy of liability insurance issued to a fixed base operator, the clause which excluded indemnification for harm to any "person operating the aircraft under the terms of any rental agreement or training program which provides any remuneration to the named insured for the use of said aircraft" did not exclude indemnification to a designated airman examiner, injured while flying with a student pilot/renter of the airplane.[248] In *U.S. Fire Insurance*, the examiner was actually flying the airplane when the accident occurred.[249] The court seemed to attach significance to the expression "renter pilot" as used in the phrase "renter pilot exclusion." The court suggested that the parties both agreed to the correct characterization of the clause.[250] The question remains as to the conclusion the court would reach if a renter pilot briefly

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[247] 394 So. 2d 469 (Fla. Dist. Ct. App. 1981).
[248] *Id.* at 469-70.
[249] *Id.* at 469.
[250] *Id.* at 470.

turned over the controls to another pilot who was not the renter, since that pilot would not fall into the characterization of "renter pilot."

The Texas Court of Civil Appeals in *Cabell v. World Service Life Insurance Co.*,[251] held that plaintiff's decedent, who jumped from an airplane in a maneuverable sport parachute, known as a para-plane, was not covered by the policy, which provided general coverage but which limited such coverage to those riding as passengers "in any previously tried, tested and approved aircraft."[252] The decedent was killed when, to avoid power lines, he turned his parachute sharply, resulting in a stall and causing his fall to the ground.[253] The court concluded from these facts that the decedent was not riding in a tried, tested and approved aircraft at the time of his death.[254] The court did affirm that, at his death, the decedent was in a "vehicle or device for aerial navigation," described in the terms of an exclusion clause in the policy.[255]

In *Bayers v. Omni Aviation Managers, Inc.*,[256] the district court held that, though the insured pilot did not have a valid medical certificate at the time of the accident, the policy of insurance issued by the defendant still applied because there was no causal connection between the accident and the insured pilot's failure to have a valid medical certificate.[257] The court stated that the insurer could have provided for such a case in the policy exclusions, and that the failure to do so was indicative of an intention to omit such a case from the exclusions.[258] The court pointed out that unfairness would result from a refusal to enforce the policy in such circumstances.[259]

Graves v. Charter National Insurance Company,[260] was an action in which the named insured added an additional

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[251] 599 S.W.2d 652 (Tex. Civ. App. — Texarkana 1980, writ ref'd n.r.e.).
[252] *Id.* at 652-53.
[253] *Id.*
[254] *Id.* at 653-54.
[255] *Id.* at 654.
[256] 510 F. Supp. 1204 (D. Mont. 1981).
[257] *Id.* at 1207.
[258] *Id.* at 1206-1207.
[259] *Id.* at 1207.
[260] 15 Av. Cas. 18,210 (Tex. Civ. App. 1980).

named insured to the policy, resulting in a loss of coverage for himself. The insured, Kelley, was sued by Graves who was injured while starting Kelley's airplane. Kelley demanded that the insurer, Charter, defend him, while Charter brought a declaratory judgment action against both Kelley and Graves, asserting that it had no duty to defend Kelley because Graves was a named insured specifically excluded under Kelley's policy, and was not, therefore, entitled to coverage.

Under the policy, Kelley and "Graves Aircraft Sales and Rental" were named insureds. Graves asserted that the exclusion of his company, later a partnership, did not exclude him personally, and that since he was not notified of his status as named insured, he could not be denied coverage.[261] The court held that the terms of the policy bound, despite Grave's lack of notice of his being named an insured. The court added that the name "Graves Aircraft Sales and Rental" was an assumed name applicable to Graves personally, which named him as an insured regardless of the legal character of his business.

The court in *Di Santo v. Enstrom Helicopter Corp.*[262] held the terms of a policy to be applicable despite the nature of binders as interim contracts of insurance. In *Di Santo* the court held that new consideration was not needed to support the addition of a pilot's qualification clause to an insurance contract which began as a binder between the insurance company and the insured, because the parties left open the pilot qualification term when the binder was issued.[263] After reviewing the correspondence between the parties, the court concluded that, when the binder was signed, both parties contemplated that the details of the insurance policy would be finalized later.[264] The court also held that there was no need to establish a causal connection between the pilot's failure to

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[261] *Id.* at 18,211.

[262] 489 F. Supp. 1352 (E.D. Pa. 1980). The term "binder" is used in insurance practice to refer to a document memorializing a temporary contract of insurance pending action by the insurer on an application. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW, 36-37 (1971); 12 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7221 (1943 & Supp. 1979).

[263] 489 F. Supp. 1352, 1358 (E.D. Pa. 1980).

[264] *Id.* at 1357.

satisfy the terms of the policy and the accident which occurred while he was piloting the craft.[265] While noting the split in authority in other jurisdictions, the court stressed that, in the instant case, the policy terms did not require a causal link between the pilot qualifications and the accident in order to render the exclusion applicable.[266] The court found that prefacing the applicability of an insurance exclusion clause with the requirement that the subject of the exclusion be causally related to the loss would amount to judicial modification of the contract.[267]

Another case involving a dispute over the effect of the failure to satisfy requirements of a pilot's qualification clause is *Goddard v. Avemco Insurance Company*.[268] In *Goddard*, the Court of Appeals of Oregon held that the insurer was not estopped to deny coverage under a policy excluding coverage for an accident involving a pilot without a valid medical certificate, even though the policy was issued by the company with knowledge that the insured did not have a medical certificate.[269] The court observed that, to effect an estoppel, there must be a representation by someone acting on behalf of the insurance company which is inconsistent with the expressed terms of the policy and which is relied upon by the insured.[270] Finding no such representation, the court concluded that the renewal of the insured's policy was not tantamount to a representation that the unambiguous medical certificate requirement in the policy was inapplicable.[271]

The court in *Underwriters at Interest v. Bill Hames Shows, Inc.*,[272] concluded that an aircraft involved in a crash was not covered by the policy of insurance due to an unauthorized

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[265] *Id.* at 1364.

[266] *Id.* The court observed that the overwhelming majority of courts hold that an insurance exclusion is effective whether or not there is any causal connection between the excluded risk and the loss. *Id.*

[267] *Id.*

[268] 43 Or. App. 39, 602 P.2d 291 (1979).

[269] 602 P.2d at 294.

[270] *Id.* at 294.

[271] *Id.*

[272] 642 F.2d 179 (5th Cir. 1981).

modification of the aircraft's rudder control system.[273] The Fifth Circuit Court of Appeals determined that the addition of a device permitting hand control of the aircraft's rudder invalidated the aircraft's FAA airworthiness certificate which was a prerequisite for coverage under the insured's policy.[274] As in *Di Santo* and *Goddard*, the court held that noncompliance with unambiguous insurance policy provisions suspended coverage, regardless of whether a causal connection existed between the noncompliance and the loss or injury.[275]

A current FAA airworthiness certificate was also a prerequisite to coverage under the insurance policy in *Ochs v. Avemco Insurance Co.*[276] In *Ochs* the defendant insurer denied liability on its policy because the airplane's standard airworthiness certificate was not valid when the accident occurred.[277] Again, as in *Underwriters at Interest*, the court rejected the plaintiff's argument that there must be causal connection between the accident and the unfulfilled condition of the policy before the condition takes effect.[278] After stating that an insurer may exclude any liability from coverage, provided doing so is not against public policy, the Oregon Court of Appeals denied coverage and held that proof of a causal connection between the cause of the accident and the policy exclusion is not required for an insurer to avoid payment.[279]

An unusual indemnification issue was addressed by the Court of Appeals of Maryland in *Bankers and Shippers Insurance Company v. Electro Enterprises, Inc.*[280] In this case, the insurance company brought an action for a declaratory judgment that its insurance policy did not provide coverage for, or obligate the company to defend, claims resulting from

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[273] *Id.* at 180.

[274] *Id.*

[275] *Id.*

[276] 80 Or. App. 768, 636 P.2d 421 (1981).

[277] 636 P.2d at 422. Coverage C of the policy excluded "any aircraft, while in flight (1) not bearing a valid and currently effective 'standard' Airworthiness Category Certificate issued by the Federal Aviation Agency." *Id.*

[278] *Id.* at 423.

[279] *Id.* at 424.

[280] 287 Md. 641, 415 A.2d 278 (1980).

an accident involving its insured's aircraft.[281] The insured and all of the representatives of persons killed in the accident were named as defendants.[282] The Circuit Court for Washington County held that the insurance company was liable to defend the insured under the terms of the policy.[283]

Thereafter, the insured and the decedent's representatives sought to recover expenses incurred while defending themselves in the insurance company's declaratory judgment action.[284] Curiously, the Circuit Court for Washington County found that all the defendants in the declaratory judgment action were entitled to receive attorney's fees and expenses incurred while defending the prior suit, even though some of these claims were not based on contractual obligations owed them by the insurance company.[285] The Court of Appeals of Maryland reversed the lower court's decision and held that only those defendants to whom the insurance company was contractually obligated were entitled to indemnification for attorney's fees and expenses incurred while defending themselves in the declaratory judgment action.[286] The court based its decision on a finding that the only expenses the insurance company had agreed to reimburse under the provisions of the insurance policy were those related to a claim filed against an insured for which the insured might become liable.[287] Although the court found that the plaintiffs in the original tort action could arguably be within the literal definition of "insured,"[288] it ruled them to be precluded from recovering attorney's fees and expenses incurred in the defense of the declaratory judgment action because there was nothing in the record that indicated they might become liable for tort claims arising

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[281] 415 A.2d at 280.

[282] *Id.*

[283] *Id.* at 281.

[284] *Id.*

[285] *Id.* at 282-83.

[286] *Id.* at 283.

[287] *Id.*

[288] *Id.* The term "insured" as used in the policy at issue was defined to include "not only the Named Insured but also any person while using or riding in the aircraft. . . ." *Id.*

out of the crash.[289]

The court in *Morgan v. Continental Casualty Co.*[290] construed a group life insurance policy as it applied in an aviation accident case. In *Morgan*, the Third District Court of Appeals of Florida held that no insurance coverage was afforded for the death of plaintiff's decedent, an airline pilot, under a group policy issued by defendant to decedent's employer, Delta Airlines.[291] Decedent was killed in the crash of a private aircraft which he owned. The insurance policy provided in part as follows:

> AIR COVERAGE
>
> Part H
>
> The insurance provided by the Policy shall apply while the Insured Employee or a Dependent covered hereunder is riding as a passenger in any aircraft properly licensed to carry passengers and while an Insured Employee is operating or performing duties as a crew member of any aircraft owned, leased or operated by Delta, including ferry flights, except that no coverage shall apply while such aircraft is being used for training or testing, except if the Insured Employee is riding solely as a passenger observer.

and

> EXCLUSIONS
>
> Part 1
>
> This Policy does not cover any loss, fatal or non-fatal, caused by or resulting from:
>
> . . . .
>
> (5) riding in any aircraft, except to the extent permitted, and specifically described in Part H, 'Air Coverage'.[292]

Against the claim of plaintiff's decedent that the term "riding as a passenger in any aircraft" was ambiguous, and in the face of the further argument that there was no exclusion for "passengers," the court held that the coverage provisions were unambiguous and did not provide coverage for the dece-

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[289] *Id.*
[290] 382 So. 2d 351 (Fla. Dist. Ct. App. 1980).
[291] *Id.* at 352.
[292] *Id.*

dent.[293] The court found that the term 'passenger' did not include a 'pilot' within the policy coverage.[294]

After noting that the plaintiff's decedent was the only licensed pilot aboard the plane when it crashed, the court adopted the position of the defendant, stating that "it is the status throughout the journey that determines whether one is a 'pilot' or a 'passenger'."[295] As additional support for this conclusion, the court cited the Federal Aviation Regulations, specifically 14 C.F.R. § 1.1 and § 91.3, which establishes that a pilot is not a passenger and does not lose his status as such if he undertakes some momentary task other than actual operation of the aircraft.[296] Therefore, the court concluded that the decedent was not a passenger when the plane crashed.[297]

In *Vanguard Insurance Co. v. Stewart*,[298] the court was faced with the issue of whether "flying time" was sufficient to afford coverage under an insurance policy which expressly required "log time." This controversy arose out of the crash of a Cessna 180 aircraft owned by Stewart, the named insured.[299] Evidence presented at trial showed that Gerald Greak was the pilot in command at the time of the crash.[300]

The defendant's policy covered the medical expenses of any airplane occupant, as well as any physical damage to the aircraft.[301] The policy, however, provided that the insurance was effective only after the aircraft's operator logged at least ten hours in a Cessna 180 aircraft, and possessed a current and valid pilot certificate with appropriate ratings, as well as a current medical certificate.[302] Neither Stewart nor Greak, who was a passenger at the time of the crash, had *logged* the required ten hours in a Cessna 180 aircraft.[303] Additionally,

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[293] *Id.*
[294] *Id.*
[295] *Id.* at 352-53.
[296] *Id.*
[297] *Id.* at 353.
[298] 593 S.W.2d 736 (Tex. Civ. App. — Houston 1979), *aff'd*, 603 S.W.2d 761 (1980).
[299] *Id.* at 737.
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *Id.* at 738.

Stewart did not have a current medical certificate.[304]

The trial court rendered a judgment in favor of the insured after finding that Greak had satisfied the requirements of coverage in the policy provisions.[305] The Texas Court of Appeals, however, disagreed and reversed,[306] finding that the jury's determination that Greak had logged ten hours in a Cessna 180 aircraft was without support in the evidence.[307] This finding was based on the court's determination that "flying time" was insufficient to satisfy coverage provisions where the policy expressly requires "log time."[308] To show that the plane was covered by the policy at the time of the accident, evidence was required that Greak had *logged* ten hours as pilot in command of a Cessna 180 either in his own log book or in a student's log book, certified by him as correct.[309] Because there was no demonstrative evidence that the pilot had logged the required ten hours at the time of the crash, the judgment for the Stewarts was reversed.[310]

VII. Cases on a Variety of Procedural Problems

In *Obenshain v. Halliday*,[311] a wrongful death action arising from the death of Congressman Richard D. Obenshain in an airplane crash, the United States was made a defendant on the theory that it was liable under the Federal Aviation Act.[312] The plaintiff alleged that the government failed to notify the pilots that the runway lights were out of service.[313] The airport operator, a co-defendant, was a resident of the same state as the plaintiff.[314] The plaintiff argued that the district court had federal question jurisdiction because the violation of the

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[304] *Id.*
[305] *Id.* at 737.
[306] *Id.* at 739.
[307] *Id.*
[308] *Id.* (citing Marson Coal Co. v. Insurance Co., Pennsylvannia, 201 S.E.2d 747 (W. Va. 1974)).
[309] 593 S.W.2d at 738-39.
[310] *Id.*
[311] 504 F. Supp. 946 (E.D. Va. 1980).
[312] *Id.* at 948.
[313] *Id.*
[314] *Id.*

FAA regulations regarding runway light maintenance and associated pilot notification was a violation of a federal law.[315] The court held that, under the standards of *Cort v. Ash*,[316] a United States Supreme Court decision, no cause of action arose from the violation of federal aviation regulations because no legislative intention to create a private cause of action for breach of these regulations existed.[317] The court's ruling was based partially on the fact that Congress had recently rejected a proposal creating a federal private action in such cases, and partially on a finding that there was no need for a federal action because available actions were adequate to meet the needs of plaintiffs.[318] While noting that the plaintiff's decedent was a member of the class protected by the federal regulations, the court found that inference of a private action was not "consistent with the underlying purposes of the legislative scheme."[319]

Next the court observed that it did not have federal question jurisdiction or diversity jurisdiction over the county because the plaintiff did not have a cause of action under the Federal Aviation Act, nor was there diversity of citizenship between the plaintiff and the county.[320] The court, however, concluded that, under the doctrine of pendent party jurisdiction, it was "both permissible and desirable to retain the county as a party defendant."[321] Relying on standards enunciated by the Supreme Court in *United Mine Workers of America v. Gibbs*,[322] and *Aldinger v. Howard*,[323] the court found that there must be a " 'common nucleus of operative fact' between claims against the United States of America and the county,"[324] that there must be subject matter jurisdiction

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[315] *Id.*

[316] 442 U.S. 66 (1975).

[317] 504 F. Supp. 946, 950 (E.D. Va. 1980). *See* [1958] *U.S. Code Cong. & Ad. News* 3741.

[318] 504 F. Supp. 946, 950 (E.D. Va. 1980).

[319] *Id.* at 950-51.

[320] *Id.* at 951.

[321] *Id.*

[322] 383 U.S. 715 (1966).

[323] 427 U.S. 1 (1976).

[324] 504 F. Supp. 946, 951 (E.D. Va. 1980).

under the Federal Tort Claims Act, and that the Constitution must allow such jurisdiction in the case of a party over whom there is no independent federal jurisdiction.[325] The court observed that the application of state law could not be avoided by dismissing the action against the non-federal party, because state law applied to claims brought under the Federal Tort Claims Act.[326] The court also noted that Congress implicitly acknowledged the possibility of joinder of other actions when it created the Federal Tort Claims Act.[327]

The plaintiff's claim to third party beneficiary status under the Airport Development Program contract between the County and the Federal Aviation Administration was dismissed by the court.[328] The court reasoned that the plaintiff's standing to sue as a third party beneficiary was determined by Virginia laws.[329] The court found that Virginia laws required the person claiming such status to show that the agreement was clearly intended to bestow a direct benefit on him.[330] Because the contract did not contain language that demonstrated a clear and definite intent to benefit the plaintiff, the court dismissed this count of plaintiff's complaint against the county.[331]

Similarly, the United States District Court for the Southern District of New York in *Griner v. Dugan*,[332] held that a plaintiff, assaulted while waiting at defendant's baggage carousel, had not stated a federal cause of action based upon the carrier's violation of federal aviation regulations, 14 C.F.R.

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[325] *Id.*

[326] *Id.*

[327] *Id.* at 952.

[328] *Id.* at 956. The plaintiff's claim to third party beneficiary status was based on language in the contract that provided that the county would "operate the airport as such for the use and benefit of the public." *Id.* n.6.

[329] *Id.* at 956.

[330] *Id. See* VA. CODE § 55-22 (1974).

[331] 504 F. Supp. 946, 956-57 (E.D. Va. 1980). The court observed that the Virginia Supreme Court would probably adopt the rationale of the Georgia Supreme Court in Miree v. United States, 242 Ga. 126, 249 S.E.2d 573, 579 (1979), that exposure of a county to liability would be too broad if every injured party was allowed to claim third party beneficiary status under a public contract. *Id.*

[332] 16 Av. Cas. 17,842 (S.D.N.Y 1981).

121.575.[333] The plaintiff claimed $1,000,000 in damages for an alleged assault by a fellow passenger who had lunged at her and attempted to touch her "in an intimate manner."[334] The plaintiff claimed that she was entitled to the protection of the FAA regulations because American Airlines had served the passenger, who appeared to be intoxicated, alcoholic beverages during the flight.[335] After applying the test announced by the Supreme Court in *Cort v. Ash*[336] for determining whether a plaintiff has an implied private cause of action for violation of a federal regulation, the court determined that, once the plane on which plaintiff and her attacker had traveled and on which the attacker was alleged to have been sold alcoholic beverages had landed, plaintiff was no longer a member of the class intended to be protected by the regulation.[337] The court also found that there was no special legislative intent to grant a private right of action and that there was a remedy available to the plaintiff under state law.[338] Thus, the court concluded that there was no need to imply a federal remedy.[339]

In *Harrod v. Pacific Southwest Airlines, Inc.*,[340] the plaintiff, who lived outside of marriage with Paula Blake, a victim of the 1978 mid-air collision at Lindbergh Field, San Diego,

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[333] 14 C.F.R. § 121.575 (1981) provides in relevant part that:

(a) No person may drink any alcoholic beverage aboard an aircraft unless the certificate holder operating the aircraft has served that beverage to him.

(b) No certificate holder may serve any alcoholic beverage to any person aboard any aircraft who—

(1) Appears to be intoxicated.

[334] 16 Av. Cas. 17,842 (S.D.N.Y. 1981).

[335] *Id.*

[336] 422 U.S. 664 (1975). The Supreme Court stated that the following questions must be answered affirmatively before a court will imply a private cause of action for violation of a federal regulation. (1) Is the plaintiff a member of the class the statute was enacted to protect? (2) Is there either explicit, or implicit, evidence of a legislative intent to create such a remedy or to deny one? (3) Is it consistent with the underlying purpose of the regulation to imply a remedy for the plaintiff? (4) Is "the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.*

[337] 16 Av. Cas. 17,842-43 (S.D.N.Y. 1981).

[338] *Id.* at 17,844.

[339] *Id.* at 17,845.

[340] 118 Cal. App. 3d 155, 173 Cal. Rptr. 68 (1981).

brought an action for her death under the California wrongful death statute. The California Court of Appeals upheld the trial court's denial of recovery under the statute despite the fact that the relationship had every earmark of marriage, including pooling of earnings, joint purchase of real property, and an agreement to share property accumulated during their relationship.[341] The court found the "meretricious spouse of a decedent is not an heir who may bring an action for wrongful death" under the statute.[342] The decision was based on the court's observations that the legislature is responsible for identifying who is entitled to sue for wrongful death, and that exclusion of meretricious spouses from the class of people which may sue for wrongful death did not deny meretricious spouses equal protection of the laws.[343]

In *Jim Fox Enterprises, Inc. v. Air France*,[344] the court addressed the issue of whether the Texas long-arm statute[345] requires that a cause of action arise out of the defendant's contacts with the state. The Texas statute makes "the act or acts of engaging in such business within this State"[346] the equivalent of the appointment of the Secretary of State as agent "upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State. . . ."[347] The court noted that, in the 1977 case of *U-Anchor Advertising, Inc. v. Burt*,[348] the Texas Supreme Court stated that Texas courts would not be required to examine minutely the character of the defendant's activities within the state to determine whether the activities were

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[341] *Id.* at 157-58, 173 Cal. Rptr. at 69.

[342] *Id.* at 157, 173 Cal. Rptr. at 69 (citing Aspinall v. McDonnell Douglas Corp., 625 F.2d 325, 327 (9th Cir. 1980)).

[343] 118 Cal. App. 3d at 157-58, 173 Cal. Rptr. at 69. The court found that the exclusion of meretricious spouses protected a variety of state interests such as deterring fraudulent claims and promoting marriage. Thus, the exclusion was a reasonable limitation on the right to recover for wrongful death. *Id.*

[344] 16 Av. Cas. 17,661 (N.D. Tex. 1981).

[345] TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon's Supp. 1980).

[346] 16 Av. Cas. 17,661, 17,662 (N.D. Tex. 1981) (quoting Tex. Rev. Civ. Stat. Ann. art. 2031b § 3 (Vernon's Supp. 1980)).

[347] *Id.*

[348] 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

within the scope of the long-arm statute.[349] In *U-Anchor*, the court held that, with respect to what acts constitute "doing business," the Texas long-arm statute is limited only by federal constitutional requirements of due process.[350]

In *Jim Fox*, however, the question was not whether the defendant was doing business within the state, but whether the action arose out of the airline's contacts with the state.[351] The court observed that federal district courts were not in agreement on whether the Texas long-arm statute requires the cause of action to arise out of the defendant's contacts with Texas.[352] The court also noted that the Fifth Circuit had treated this factor as a separate prerequisite to application of the long-arm statute.[353] Based on this observation, the court reasoned that the Texas statute did not authorize suit in the instant case because the cause of action did not arise out of the defendant's contacts with the state.[354] Therefore, the defendant's motion to dismiss the suit was granted.[355]

In *Donahue v. Far Eastern Air Transport Corp.*,[356] the Court of Appeals for the District of Columbia held assertion of personal jurisdiction over a Taiwanese company to be incompatible with due process. The court determined that to require Far Eastern, a company lacking any substantial base within the United States, to respond in the United States for the death of United States citizens killed on an intra-island flight in Taiwan, the tickets for which were purchased in Tai-

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[349] 16 Av. Cas. 17,661, 17,662 (N.D. Tex. 1981).

[350] *Id.*

[351] *Id.* at 17,663.

[352] *Id. See* Ayers v. Copperweld Corp., 487 F. Supp. 593 (S.D. Tex. 1980) (holding that the cause of action did not arise out of contacts even indirectly and therefore there was no basis for in personam jurisdiction) and Guiterrez v. Raymond Int'l, Inc., 484 F. Supp. 241 (S.D. Tex. 1979) (holding that to establish jurisdiction over nonresident corporation under Texas long-arm statute contract provision, it is necessary that there be a connection between the contract and the cause of action). *Cf* Navarro v. Sedco, Inc., 449 F. Supp. 1355 (S.D. Tex. 1978) (holding that a cause of action need not arise directly out of defendant's contacts with Texas).

[353] 16 Av. Cas. 17,661, 17,663 (N.D. Tex. 1981).

[354] *Id.*

[355] *Id.* at 17,644.

[356] 652 F.2d 1032 (D.C. Cir. 1981).

wan, would offend traditional notions of due process.[357] The only contacts Far Eastern had with the United States were three California connections.[358] Far Eastern paid for purchases from American companies with funds on deposit in a California bank, it applied to the Civil Aeronautics Board to initiate a Taipei-Los Angeles cargo charter service, and it negotiated with United Airlines to purchase two of United's airplanes.[359] The court concluded that these connections were insufficient to support assertion of personal jurisdiction over Far Eastern, and granted Far Eastern's motion to dismiss the actions instituted against it in federal courts.[360]

In *Aycock v. Louisiana Aircraft, Inc.*,[361] the Fifth Circuit held that doing business of a "systematic nature" in Mississippi was sufficient to bring the Louisiana defendant within the scope of the Mississippi long-arm statute.[362] The court so held despite the fact that there was no direct link between the cause of action and the defendant's business activity in Mississippi.[363] Because plaintiff's cause of action was incidental to the defendant's business activity in Mississippi, the court concluded that assertion of jurisdiction over the defendant would not offend notions of fairness or substantial justice.[364]

In *Sugarman v. Aeromexico, Inc.*,[365] the plaintiff brought an action against Aeromexico for wrongs allegedly suffered by him in the Acapulco airport while awaiting a delayed Aeromexico flight to New York City.[366] The United States District Court for the District of New Jersey rendered summary judgment for the airline after concluding that the airline's public status precluded a court in the United States from ex-

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[357] *Id.* at 1039.

[358] *Id.* at 1034.

[359] *Id.* at 1034-35.

[360] *Id.* at 1039.

[361] 617 F.2d 432 (5th Cir. 1980).

[362] *Id.* at 434 (construing MISS. CODE ANN. § 13-3-57 (1972)).

[363] *Id.* at 435.

[364] *Id. See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[365] 626 F.2d 270 (3d. Cir. 1980).

[366] *Id.* at 271. The plaintiff alleged that he had to wait for fifteen hours under extremely brutal conditions causing him "physical pain and mental anguish," injury to his health, and loss of time and wages. *Id.*

ercising subject matter jurisdiction over the airline.[367] The Third Circuit reversed the lower court and held that a wholly owned corporate subsidiary of the sovereign State of Mexico was not immune from the jurisdiction of the United States courts.[368] The court found that the corporation was subject to jurisdiction because section 1605(a)(2) of the Foreign Sovereign Immunities Act provides that such state-owned commercial entities are subject to the jurisdiction of American courts, notwithstanding the immunity of their sovereign, if "the action is based upon a commercial activity carried on in the United States by the foreign state or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . ."[369] In support of its conclusion, the court noted that the legislative history of the Act indicated that foreign state immunity was intended to be limited to suits involving a foreign state's public acts and was not intended to apply to suits based on a foreign state's private or commercial acts.[370]

In Re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980,[371] was brought by representatives of persons who died from inhalation of poisonous gases produced by a fire aboard a Saudi Arabian Airlines Corporation plane. The action was brought in the District Court for the District of Columbia under section 1605(a)(27) of the Foreign Sovereign Immunities Act.[372] The court rejected the plaintiff's argument that the case fell within section 1605(a)(2), after concluding that the airline's negligence did not produce a direct effect in the United States.[373] Contrary to the position taken by the Third Circuit in *Sugarman*, the court found that the commercial activities of the Saudi Arabian Airlines in the United States were insufficient to permit the plaintiffs to assert juris-

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[367] *Id.* at 272.

[368] *Id.* at 275.

[369] *Id.* at 272-73.

[370] *Id.* at 275. *See* H.R. REP. No. 1487, 94th Cong., 2nd Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6605, 6606.

[371] 16 Av. Cas. 17,880 (D.D.C. 1981).

[372] *Id.* 28 U.S.C. § 1602-11 (1976).

[373] 16 Av. Cas. 17,880, 17,881 (D.D.C. 1981).

diction over the airline under the section 1605(a)(2) exception to sovereign immunity.[374] The court stated that when a claim arises out of a sovereign's activities conducted outside the United States, the section 1605(a)(2) exception to sovereign immunity is applicable only if the activity has a direct effect in the United States.[375]

In *Tokio Marine and Fire Insurance Co. v. McDonnell Douglas Corp.*,[376] the United States District Court for the Southern District of New York rendered summary judgment for McDonnell Douglas in an action brought by Tokio Marine, Japan Air Line's (JAL) insurer, for property damage, contribution and indemnity claims arising out of a 1972 crash of a McDonnell Douglas DC-8 during take-off from Moscow, U.S.S.R.[377] The court also rendered summary judgment in favor of JAL and Tokio Marine on McDonnell Douglas' counterclaim for contribution and indemnification.[378] The trial court's decision was affirmed by the Second Circuit.[379]

On appeal, Tokio Marine asserted that California law prohibits a manufacturer from disclaiming strict tort liability, and that it was therefore entitled to recover from McDonnell for the value of the plane.[380] The Second Circuit found that the terms of McDonnell Douglas' sales warranty precluded recovery by Tokio Marine because the warranty expressly provided that JAL, as purchaser, waived "all liabilities . . . arising by law or otherwise . . . whether or not caused by the seller's negligence."[381] The court concluded that equal bargainers, such as McDonnell and JAL, may disclaim strict tort liability.[382] On appeal, the Second Circuit also determined that the district court had correctly rejected McDonnell Douglas' claim for indemnity and contribution on the grounds

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[374] *Id.* at 17,882. The airline had four offices in the United States and conducted business in Missouri, Texas, California and New York. *Id.*

[375] *Id.* at 17,881.

[376] 617 F.2d 936 (2nd Cir. 1980).

[377] *Id.* at 938.

[378] *Id.*

[379] *Id.*

[380] *Id.* at 939.

[381] *Id.* at 940.

[382] *Id.* at 941.

that a concurrent tortfeasor, such as JAL, who in good faith has discharged an obligation resulting from the tort, is absolved from any claim of indemnification by another, concurrent tortfeasor.[383] McDonnell Douglas sought to avoid the effect of this rule by showing that the claims settled by JAL were created by the Warsaw Convention and were contractual rather than tortious in nature.[384] The court acknowledged that, in the Second Circuit, the Warsaw Convention is seen as creating a cause of action but suggested that since it was unclear whether a claim under the Convention is in contract or tort, and since the plaitiffs had alleged actions in tort as well as under the non-exclusive Warsaw Convention, the actions settled by JAL were settled by a concurrent tortfeasor.[385]

Representatives of refugee children killed in the tragic crash of a C-5 "Galaxy" in Viet Nam, during the American evacuation, sued the aircraft manufacturer in *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*[386] The plaintiffs sought a ruling in limine[387] to prevent the manufacturer from relitigating certain issues that had been decided in previous cases arising out of the same crash.[388] The court treated the request as a motion for summary judgment, and granted it, noting that the law of the District of Columbia permits the use of the doctrine of offensive collateral estoppel.[389]

On appeal, the Court of Appeals for the District of Columbia reversed the trial court decision after finding that there was not a "substantial identity of issues" among the prior cases and the instant case.[390] Although the plaintiffs shared the identical experience, the witnesses were the same, and Lockheed had vigorously defended itself in the prior actions,

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[383] *Id.* at 942.

[384] *Id.*

[385] *Id.*

[386] 497 F. Supp. 313 (D.D.C. 1980), *rev'd sub nom.*, Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C.C. 1981).

[387] A ruling in limine is a written motion presented before or after the commencement of a jury trial seeking a protective order against prejudicial questions and statements. BLACK'S LAW DICTIONARY (5th ed. 1979).

[388] 497 F. Supp. at 314.

[389] *Id.* at 316-17.

[390] 658 F.2d at 852.

the court determined that Lockheed could not be collaterally estopped from denying that the accident caused the injuries alleged by the plaintiff.[391] Reasoning that the likelihood that the accident caused the injuries alleged would vary from case to case, the court concluded that Lockheed would be denied its day in court if it were not permitted to adjudicate the causation issue in each case.[392]

In *Sterman v. Trans World Airlines, Inc.*,[393] the Second Circuit held that alleged fraudulent misrepresentation in the sale of a package tour did not create a federal cause of action in violation of the terms of the Federal Aviation Act section 404(b).[394] That section prohibits carriers from subjecting any person to any "unreasonable prejudice or disadvantage."[395] The plaintiffs claimed that, although Trans World Airlines (TWA) promised them hotel accomodations at substantial savings, they were charged rates above that normally charged for the accommodations they received.[396] After determining that the terms "unreasonable prejudice or disadvantage" were not meant to turn the statute into a general prohibition against deceptive trade practices, the court concluded that the acts complained of did not fall within the scope of the statute.[397]

In *Federal Insurance Co. v. United States*,[398] the plaintiff insurance company was a subrogee of the victim of the negligence by the United States which failed to properly maintain a landing strip. The federal government was responsible for not closing the strip when its use became dangerous.[399] The fatal accident occurred when the pilot unsuccessfully attempted to land his plane on the strip which was muddy and

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[391] *Id.*
[392] *Id.*
[393] 657 F.2d 511 (2d Cir. 1981).
[394] Section 404(b) of the Federal Aviation Act of 1958 § 404(b), 49 U.S.C. § 1374(b) (1976).
[395] 657 F.2d at 512.
[396] *Id.*
[397] *Id.*
[398] 618 F.2d 661 (1980).
[399] *Id.* at 662.

overgrown with tall weeds.[400] Prior to this action, the executrix of the pilot's estate brought an action against the United States in the United States District Court for Nebraska.[401] In that action, the United States refused to permit the plaintiff insurance company to intervene on the ground that the insurance company would not be bound by the action.[402] The earlier Nebraska suit was dismissed for failure of proof.[403]

In *Federal Insurance,* the United States moved for summary judgment, arguing that the plaintiff insurance company was bound by the Nebraska order because it was bringing an action by subrogration.[404] The trial court determined that since the United States had asserted that the plaintiff could not be bound in the first action, the plaintiff could not now be held bound by the Nebraska dismissal without making a mockery of res judicata.[405] The trial court then denied defendant United States' motion for summary judgment and proceeded to trial.[406]

Without directly ruling on the validity of the trial court's ruling, the appellate court observed that res judicata is an affirmative defense, which must be pleaded and proved by the party asserting it.[407] Because the United States offered no such proof, but seemed to abandon its estoppel-res judicata argument after the trial court denied its motion for summary judgment, the Tenth Circuit Court of Appeals concluded that any reliance on that argument had been abandoned.[408] Therefore, the court affirmed the trial court's judgment for the plaintiff.[409]

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[400] *Id.*

[401] *Id.* In that suit the plaintiff became subrogated to the claims of the representatives of the passengers who died in the crash. *Id.*

[402] *Id.*

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.* at 663.

[408] *Id.*

[409] *Id.*

VIII. CHOICE-OF-LAW CASES

In *In Re Air Crash Disaster Near Chicago, Illinois,*[410] the Seventh Circuit Court of Appeals was forced to decide which law applied to the issue of punitive damages. One hundred eighteen wrongful death actions arising out of the Chicago-O'Hare DC-10 disaster of May 1979 were filed in six states or territories by representatives of decedents who had resided in twelve states or territories and three foreign countries.[411] One of the defendants, McDonnell Douglas Corp., was a Maryland corporation with its principal place of business in Missouri and its manufacturing facility in California.[412] The other defendant, American Airlines, had its principal place of business in New York until the year of the accident, when it moved to Texas.[413] American also had a maintenance facility in Oklahoma where its misconduct was alleged to have occurred.[414] In an opinion which is now regarded as a textbook on the modern choice-of-law, the Seventh Circuit chose the law of Illinois, the place of the accident, which does not allow punitive damages.[415]

Because all of the cases had been filed as diversity actions, the court first established that the choice-of-law rules of those states where the actions were originally filed would be used.[416] The court then announced that it would apply the principle of

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[410] 644 F.2d 594 (7th Cir. 1981).

[411] *Id.* at 604. The decedents were residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Vermont, Puerto Rico, Japan, the Netherlands, and Saudi Arabia. *Id.*

[412] *Id.*

[413] *Id.*

[414] *Id.* at 605. The district court had allowed the motion to strike punitive damages against defendant American Airlines in the Illinois cases because, under Illinois choice-of-law principles, the law of the principal place of business would apply. For American Airlines the district court held that the principal place of business would be New York and New York does not allow punitive damages. The district court, however, retained the damage claim for punitive damages against defendant McDonnell Douglas because its principal place of business was Missouri which allows punitive damages. The same results were reached in the California, New York, Michigan, Hawaii and Puerto Rico cases, but on slightly different grounds. *Id.*

[415] *Id.* at 625-26.

[416] *Id.* at 610.

"depecage"[417] under which courts are guided by "the notion that we must examine the choice-of-law rules not with regard to various states' interests in general, but precisely, with regard to each state's interest in the specific question of punitive damages."[418] The court proceeded to describe the analysis as "the process of applying rules of different states on the basis of the precise issue involved."[419]

The court then examined the choice-of-law rules of each of the states to determine the applicable law of punitive damages.[420] It is in this lengthy analysis that the character of the opinion becomes apparent.[421] The court applied almost all of the available choice-of-law principles.[422]

In *Air Crash Disaster,* the court engaged in an analysis of the reasons for which states allow or disallow punitive damages.[423] The court observed that a state which allows punitive damages is concerned with punishing the defendant and deterring others.[424] On the other hand, a state which disallows punitive damages has as its purpose the prevention of excessive damage awards.[425] Using these observations, the court then analyzed the interests of the several states regarding application of their punitive damages laws.[426]

The court began its analysis with an examination of the "significant relationship" test of the *Restatement (Second) of*

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[417] *Id.* at 611. The court stated that "there is only one relevant issue: the choice-of-law regarding punitive damages. Thus we use the term [depecage] here to mean a precise focus on the purpose of and policies behind the decision to either allow or disallow punitive damages." *Id.* at 611 n.13.

[418] 644 F.2d at 611.

[419] *Id.*

[420] *Id.* at 611-32. Each defendant's contacts with each state in which the cases were brought is discussed separately. *Id.*

[421] *Id.*

[422] *Id.*

[423] *Id.* at 609-10.

[424] *Id.* at 622.

[425] *Id.* at 610. It seems, however, that there is yet another purpose served by an award of punitive damages. This purpose is the enhancement of the award to the plaintiff. It is quite certain that this costly litigation is totally unconcerned with the legislative purposes of punishment and deterrence versus the prevention of excessive awards. It is concerned with the damages available to the plaintiff from the defendant's pocket.

[426] *Id.* at 611-32.

Conflict of Laws which is the Illinois choice-of-law rule.[427] This test presumes that, in tort cases, the law of the place of the injury applies, unless another state has a "more significant relationship" with the event or the parties.[428] Although the court considered the criteria laid down by the *Restatement,* it seemed to rest its decision upon balancing the contacts McDonnell Douglas had with its state of incorporation (Missouri), with the state of misconduct (California, where the plane was built), and with the place of injury (Illinois).[429] Missouri had an interest in allowing punitive damages in order to control the conduct of its corporations.[430] California, on the other hand, had an interest in protecting a domestic corporation against excessive liability because the corporation could have been induced to locate in the state by the California rule against punitive damages.[431] The court decided that Illinois' interests were paramount to those of Missouri and California because of its interest in promoting airline transportation and safety within Illinois, and its involvement in the aftermath of the accident.[432] The court concluded by commending the predictability of the Illinois choice-of-law rule:

> [A]ir transportation companies will now be on notice that, under the "most significant relationship" test, when there is a true conflict between laws of states having equal interests in the issue of punitive damages, and when the place of injury has a strong interest in air safety and in protection of air transportation corporations, the law of the place of the injury will apply.[433]

Choice-of-law questions seem to be among the most difficult issues courts are called upon to settle. One example of the difficulty that courts have had with these questions is the Seventh Circuit decision of *Pittway Corp. v. Lockheed Aircraft*

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[427] *Id.* at 611.
[428] *Id.*
[429] *Id.* at 615-16.
[430] *Id.* at 613.
[431] *Id.* at 614.
[432] *Id.* at 615-16.
[433] *Id.* at 616.

Corp.[434] The court considered an action for damage to an aircraft resulting from a cracked frame and the economic loss caused by the unavailability of the airplane for its intended purposes.[435] The action was based upon diversity of citizenship and was filed in Illinois.[436] Illinois was the plaintiff's principal place of business, where the airplane was hangared, and the location from which the airplane was customarily operated.[437] Illinois does not permit recovery for economic loss.[438] The airplane was manufactured by the defendant in Georgia.[439] A defect in the frame was discovered at a repair facility in Wisconsin, where the airplane was flown after the manufacturer notified users of the possibility of main frame cracks and after an effort to perform the inspection in Illinois.[440]

The Seventh Circuit reversed the district court, which had held that the case was governed by Wisconsin law permitting recovery of purely economic damages in product liability tort actions.[441] The appellate court, applying the Illinois choice-of-law rule,[442] found that Illinois law controlled.[443] The court rejected the trial court's conclusion that the place where the defect was discovered was the place of the injury, because it found that the place where the crack actually occurred was indeterminable.[444] Additionally, the court found that Georgia and Illinois had greater relationships to the litigation.[445] Both states bar recovery of economic damages in products liability

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[434] 641 F.2d 524 (7th Cir. 1981).

[435] *Id.* at 525.

[436] *Id.*

[437] *Id.* at 525-26.

[438] *Id.* at 525.

[439] *Id.*

[440] *Id.* at 526.

[441] *Id.* at 529.

[442] *Id.* at 526. Illinois applies the "most significant relationship" test of the *Restatement (Second) of the Conflict of Laws* to determine the applicable law in tort actions. *Id.*

[443] *Id.* at 529.

[444] *Id.* at 527-28.

[445] *Id.* at 528-29. The court noted that the economic harm suffered by the plaintiff occurred in Illinois and that Lockheed was among those intended to be protected by the Georgia law barring recovery of economic damages. *Id.*

actions.[446] The court concluded that the policy behind Georgia's rule barring recovery of economic damages was to "protect the economic well-being of Georgia manufacturers . . . by limiting the scope of potential liability for product defects to that established contractually by the parties."[447] This goal was in accord with the Illinois rule, thus Illinois law controlled.

In *Bodnar v. Piper Aircraft Corp.*,[448] an action filed in an Alabama circuit court for the wrongful death in Georgia of a Georgia resident, the Alabama Supreme Court adhered strictly to the rule of lex loci delicti in holding that the Georgia statute of limitations applied rather than the Alabama statute.[449] Despite the plaintiff's adroit argument that the Alabama statute of limitations applied as part of the procedural law of the forum because the Georgia wrongful death statute did not incorporate the Georgia statute of limitations, the court in *Bodnar* held that this was not the proper case for the court to depart from the traditional conflict of laws rule, lex loci delicti.[450] The court stated that, even if it were persuaded to do so, it "would not necessarily apply the law of a state other than that compelled under the existing rule" because Alabama's contacts with the action did not outweigh the fact that the cause of action accrued in Georgia.[451]

In *Bishop v. Florida Specialty Paint Co.*,[452] the Florida Supreme Court abandoned the conflict of laws rule of lex loci delecti and adopted the "significant relationship test" set forth in *Restatement (Second) of Conflict of Laws* sections 145-146.[453] In rejecting the lex loci delicti doctrine, the court

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[446] *Id.* at 525.

[447] *Id.* at 528-29.

[448] 392 So.2d 1161 (Ala. 1980).

[449] Georgia has a general two-year statute of limitations which is codified at GA. CODE ANN. § 3-1004 (1975). Alabama has a general one-year statute of limitations which is codified at ALA. CODE § 6-2-39 (1975).

[450] *Id.* at 1163. The court, citing Spencer v. Malone Freight Lines, Inc., 292 Ala. 582, 298 So. 2d. 20 (1974), noted that it had "consistently" adhered to the *lex loci delicti* rule to determine which substantive law to apply in multistate tort actions." *Id.*

[451] *Id.* at 1164.

[452] 389 So. 2d 999 (Fla. 1980).

[453] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-146 (1971).

stressed the need for a more flexible rule, particularly in the case of aviation accidents, because the state of the injury may have little actual significance to the cause of action.[454] The court concluded that the "significant relationship test" made the determination of applicable law "a less mechanical, and a more rational process."[455]

IX. Cases on Recordation of Security Interests and Certain Other Contract and Uniform Commercial Code Problems

CIM International v. United States,[456] a case concerning the frequently troublesome section 1403(c) of Title 49 of the United States Code,[457] continued its sorry progress through the courts. Section 1403(c) starkly states that "[n]o conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft . . . against any person . . . until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation."[458] In *CIM*, Austin, a delinquent taxpayer, purchased an airplane from Woodall, giving Woodall only a promissory note for the entire purchase price, secured by an agreement granting a security interest in the plane.[459] Austin filed an ownership statement with the Federal Aviation Administration (FAA) pursuant to section 1403.[460] Woodall assigned its interest to Empire Savings Bank of Springfield, Missouri, with recourse.[461] Empire filed with the Secretary of State of Nevada a financing statement which disclosed the respective interests of Empire, Woodall and Austin.[462] Austin did not make scheduled payments on the promissory note, therefore, Empire reassigned all of its interests to

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[454] *Id.* at 1001-02.
[455] *Id.* at 1002.
[456] 641 F.2d 671 (9th Cir. 1980).
[457] 49 U.S.C. § 1403(c) (1976).
[458] *Id.*
[459] 641 F.2d at 672.
[460] *Id.*
[461] *Id.*
[462] *Id.* at 673-74.

Woodall and released Woodall from its "with recourse" obligation.[463] The United States thereafter filed two tax liens with the State of Nevada on property belonging to Austin, but did not file with the FAA and did not examine the FAA registry.[464] Thereafter CIM purchased Woodall's interests, obtained a bill of sale from Austin, and filed an ownership registration certificate with the FAA.[465] While the airplane was being used under the authority of CIM, it was seized by the United States for Austin's nonpayment of taxes.[466]

CIM began an action against the United States, eventually paid the taxes to secure release of the airplane, and then sought a refund of wrongfully collected taxes.[467] The district court held that, because Woodall had not recorded the reassignment to it by Empire of the security interest, Woodall had only an unperfected security interest.[468] Further, the court determined that any right, title or interest acquired by Woodall was extinguished when Empire filed a notice of the release and reassignment to Woodall with the FAA on September 27, 1977.[469] Because CIM succeeded only to the right title or interest held by Woodall, which was nothing at the time of the purchase, the federal tax lien was superior to any interests claimed by either Woodall or CIM.[470]

The court of appeals described the purpose of the section 1403(c) recording provisions as being one of protecting persons who have relied on the FAA register and of protecting good faith purchasers' security interests against unregistered interest holders.[471] The court firmly rejected the literal interpretation of section 1403(c) suggested by the United States, that nonregistration invalidated a security interest.[472] The court stressed that the statute was designed merely to provide

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[463] *Id.* at 673.
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] *Id.*
[468] *Id.* at 674.
[469] *Id.* at 673-74.
[470] *Id.*
[471] *Id.*
[472] *Id.*

a convenient, single registry for instruments affecting title to aircraft.[473] The court further observed that the validity of any instrument recorded under the act was determined by applicable state law.[474] Because Empire's interest in the aircraft was on file with the State of Nevada and the FAA when the United States filed its tax lien, the court concluded that the purpose of section 1403 would not be thwarted by holding that Woodall's interest was superior to that of the United States.[475]

The court reasoned that CIM, an innocent purchaser who had relied on the FAA register, would be penalized if the court were to treat section 1403 as a race statute.[476] Additionally, the court noted that CIM could not have learned of Austin's tax liability from the FAA register, but that the government would have discovered Empire's interest and subsequent reassignment of that interest to Woodall if it had examined the FAA register prior to its seizure of the airplane.[477] The court concluded that the practice of the United States of "seize first and determine rights later," regardless of the existence of security interests on file with the FAA, favored parties who totally ignored the FAA register to the detriment of parties who respected it.[478] Therefore, the court of appeals reversed the summary judgment granted by the district court and held that the seizure did not destroy CIM's senior lien because "a security interest in an aircraft is not necessarily invalid against all parties for all purposes and under all conditons solely because it is not filed with the FAA."[479]

In *Holiday Airlines Corp. v. World Airways*,[480] another case concerning noncompliance with the recording provisions of section 1403,[481] the Ninth Circuit Court of Appeals held that a

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[473] *Id.*
[474] *Id.* at 675.
[475] *Id.* at 676.
[476] *Id.*
[477] *Id.*
[478] *Id.*
[479] *Id.* at 678.
[480] 647 F.2d 977 (9th Cir. 1981).
[481] 49 U.S.C. § 1403 (1976).

consensual lien perfected by possession is not invalid for failure to be recorded under section 1403.[482] Holiday Airlines Corp. (Holiday) owned one plane and was the lessee of another. Shortly before Holiday was declared bankrupt in 1975, it granted World Airways (World) a chattel mortgage on one of its planes, #974, to secure the $70,165.65 it owed World for maintenance, repair and overhaul of a plane, #971, that Holiday had leased from a third party.[483] Immediately thereafter, plane #974 was sold and World received payment for services performed on plane #971.[484] Because the chattel mortgage on plane #974 was never filed with the FAA pursuant to section 1403, Holiday's trustee in bankruptcy asserted that World's claim to the proceeds of the sale of #974 was no better than that of a general creditor, and thus, that satisfaction of the $70,165.65 debt owed World by Holiday, with proceeds from the sale of plane #974 constituted a preference.[485]

The court rejected the trustee's argument, concluding that the consensual lien of World under its agreement with Holiday was perfected by its possession of the aircraft.[486] In addition, the court noted that the lien was not invalid, under the language of section 1403, merely because it was not recorded in the FAA registry.[487] The court emphasized that its holding was limited to a case in which the lienholder was in possession of the chattel.[488] The court reasoned that the transaction in which the chattel mortgage on plane #974 was given to secure payment for services performed on plane #971, which World had released once the mortgage was executed, was "a *substitution* of one security for another," rather than a preference, because it did not diminish the bankrupt estate.[489]

The court in *Bitzer Croft Motors v. Pioneer Bank and*

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[482] 647 F.2d at 980.
[483] *Id.* at 978-79.
[484] *Id.* at 979.
[485] *Id.*
[486] *Id.* at 981.
[487] *Id.* at 979-80.
[488] *Id.* at 980.
[489] *Id.* at 982.

Trust Co.[490] ruled that the holder of a security interest in an airplane, recorded in the FAA registry, who authorized the debtor to remain in possession of the airplane and to sell it as part of the business, is estopped from asserting its security interest against a good faith purchaser of the airplane, even though the purchaser did not record its interest in the airplane.[491] In a pattern frequently repeated in cases involving this problem, Bitzer-Croft purchased a Piper Lance from Southern Illinois Aviation, Inc. (Southern) and granted a security interest in the plane to Belleville Bank as part of a loan agreement.[492] On the day of sale, Southern borrowed money from Pioneer Bank and gave Pioneer a chattel mortgage security interest in the aircraft.[493] Pioneer, after finding no prior registration of aircraft ownership or any other interest in the plane, filed the chattel mortgage, along with the three original bills of sale, in the FAA register on November 28, 1977.[494] Bitzer-Croft never filed its bills of sale. The conflicting interests in the plane were discovered when Belleville Bank examined the federal register and found a recorded security interest in favor of Pioneer Bank.[495]

Because the agreement between Southern and its lender, Pioneer Bank, authorized Southern to remain in possession of the airplane and to sell it, the court held that Pioneer Bank was estopped to assert its security interest in the airplane against a purchaser, who was entitled to possession of and a free title to the airplane it had purchased in the ordinary course of business, notwithstanding the fact that the good faith purchaser had not filed its interest with the FAA.[496] The court concluded, as did the court in *CIM International* and *Holiday Airlines*, that the provisions of the Federal Aviation Act pertaining to recordation of interests in aircraft were intended merely to provide a single place of registration and not

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[490] 82 Ill. App. 3d 1, 401 N.E.2d 1340 (1980).
[491] 401 N.E.2d at 1346-47.
[492] *Id.* at 1342.
[493] *Id.* at 1342-43.
[494] *Id.* at 1343.
[495] *Id.*
[496] *Id.* at 1346-47.

to validate interests and titles.[497]

In *U.C. Leasing, Inc. v. Laughlin*,[498] the appellant (lessor) entered into a contract with the respondent (lessee) in which the lessor purported to "lease" the respondent an airplane.[499] The contract was to run for five years with a monthly rental of $1,144. At the end of that period, the lessor was to regain possession of the airplane.[500] The contract also allowed the lessee to sell the airplane if it became unsuitable for use. The lessee was entitled to the proceeds of the sale, if he paid the lessor the amount then owing under the contract plus $5,500.[501] Finally, the lessee was to bear all risk of loss, pay all taxes and fees, and pay all insurance premiums.[502] The lessor disclaimed all implied or expressed warranties.[503]

The lessee made nine monthly installments before defaulting. The lessor repossessed the airplane and it was later sold.[504] The lessor then brought suit, seeking damages in the amount of the difference between the money due under the contract plus $5500 and the proceeds received from the sale.[505]

The district court held that the contract was a "security lease"[506] subject to the Uniform Commercial Code of Nevada,[507] and that the lessor was precluded from recovering a deficiency because he refused lessee's offer to redeem the airplane as fulfillment of the terms of the contract.[508] In determining that the lease was one intended for security, the district court compared the option price to the total rentals.[509]

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[497] *Id.* at 1345.

[498] 606 P.2d 167 (Nev. 1980).

[499] *Id.* at 168.

[500] *Id.* at 168-69.

[501] *Id.* at 169.

[502] *Id.*

[503] *Id.*

[504] *Id.* at 169.

[505] *Id.* at 168.

[506] NEV. REV. STAT. § 104.9105,1.(1) (1973). "Security agreement" means an agreement which provides for or creates a security interest. *Id.*

[507] 606 P.2d 167 (Nev. 1980).

[508] *Id.* at 170. *Cf.* Granite Equip. Leasing Corp. v. Acme Pump Co., Inc., 335 A.2d 294 (1973).

[509] *Id.* at 170, NEV. REV. STAT. § 104.1201(37)(b) (1973) (defines security interest as

Because neither party proffered evidence at trial of the fair market value of the plane at the end of the lease period, the Supreme Court of Nevada found it impossible for the trial court to use this criterion to determine whether the plane could have been purchased for nominal consideration.[510]

The state supreme court ruled that the lease was subject to Nevada's Code, because the lessee was required to perform, and the lease, the rental payment, and the option price equaled the purchase price plus approximately eleven percent interest.[511] In addition, the lessee had an option to become owner of the airplane.[512] The state supreme court further held that, because the lessor produced no evidence of the fair market value of the airplane at the time the lessee's offer of redemption was refused, it is presumed that the collateral had a fair market value equal to the amount of the debt. A deficiency judgment, therefore, was not permitted and the lessor was not entitled to recover.[513]

X. The National Transportation Safety Board

Section 706 of the Administrative Procedure Act[514] prohibits regulations which are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations."[515] A regulation of the National Transportation Safety Board (NTSB) governing the testimony of Board employees teeters, in the eyes of many, on the brink of the abyss described in section 706.[516] Among other prohibitions and restrictions, the NTSB regulation prohibits employees of the Board from testifying to matters beyond the scope of an investigation conducted by them and from giving opinion testi-

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applied to options in leases).

[510] 606 P.2d 167, 171 (Nev. 1980).

[511] *Id.*

[512] *Id.*

[513] *Id.*

[514] 5 U.S.C. § 706 (1976).

[515] *Id.* § 706(2).

[516] *See* 49 C.F.R. § 835 (1981).

mony concerning the cause of the accident.[517]

The regulation was perhaps pushed closer to the edge by the decision of the district court in *Vaca v. The Boeing Company*.[518] The court in *Vaca* not only upheld the right of the Board to adopt such a regulation, but granted defendant's motion to strike the deposition testimony of a Board employee which did not comply with those regulations.[519]

In *Vaca*, the Board expert who had not conducted the investigation at all was called merely as an expert and testified under subpoena.[520] The court cited the usual Board reasons for its practice of isolating its employees except in limited circumstances,[521] and rejected an argument by plaintiff that, since the accident was a foreign accident, the regulations did not apply.[522] The court also rejected plaintiff's argument that the regulations did not apply because the witness testified in his personal capacity, not as an employee of the Board. The court took the view that the regulation applied to persons who are or were employees of the Board.[523]

XI. Cases Dealing With Pilots

In *Jenson v. Administrator of the Federal Aviation Administration*,[524] the court held section C of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1977 (Act)[525] superseded the terms of Federal Aviation Regulations section 67.15.[526] Section 67.15 requires that, in order to be eligible for a second-class medical certificate, the applicant must have no established medical history of alcoholism.[527] The Act, on the other hand, provides that no person "may be denied . . . a Federal professional or

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[517] 49 C.F.R. § 835.3(b) (1981).
[518] 16 Av. Cas. 17,451 (S.D. Fla. 1981).
[519] *Id.*
[520] *Id.*
[521] *Id.*
[522] *Id.*
[523] *Id.*
[524] 641 F.2d 797 (9th Cir. 1981).
[525] 42 U.S.C. § 4561 (1976).
[526] 14 C.F.R. § 67.15(d)(ii) (1976).
[527] *Id.*

other license or right solely on the grounds of prior alcohol abuse or prior alcoholism."[528]

The dissenting opinion suggested that a medical certificate might not be a license and that the medical history of prior alcohol abuse or alcoholism was not the sole ground for the denial of the certificate.[529] The dissent pointed out that considerations of public safety and the uncertainty of medical knowledge about alcoholism formed the basis for the regulation's denial of the medical certificate in cases where there was an established medical history of alcoholism.[530]

The court rejected the FAA's argument that the availability of an exemption,[531] upon application to the administrator, negated the contention that the certificate might be denied solely on the ground of prior alcoholism because there was no appeal of the denial of any exemption petition before the court. The court suggested, however, that the exemption procedure itself did not comport with due process because it did not provide sufficiently specific standards to give the court a basis for review.[532]

In *Smallwood v. United Airlines, Inc.*,[533] a requirement by United Airlines that applicants for positions as flight officer be under the age of 35 was held by the Fourth Circuit not to be a bona fide occupational qualification (BFOQ).[534] The court held that economic considerations resulting from an attenuation of the value received by the employer when a latecomer to the organization received the same training and retraining given an early comer, could not be used in determining whether a qualification was a BFOQ.[535] The court also held that the safety considerations advanced by United, to the effect that a latecomer would not blend as easily with crews long-experienced in the ways of the company, and that the

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[528] 42 U.S.C. § 4561(c)(2) (1976).
[529] 641 F.2d at 800 (Trask, J., dissenting).
[530] *Id.* at 800.
[531] *Id.* at 799; 14 C.F.R. § 11.27(e) (1980).
[532] 641 F.2d 797, 799 (9th Cir. 1981).
[533] 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3979 (U.S. June 1, 1982).
[534] 19 U.S.C. § 623.
[535] 661 F.2d at 307.

incidence of cockpit medical emergencies would increase, were not supported by the evidence.[536]

XII. Cases Dealing With Noise Abatement and the Avigation Easement

In *Owen v. City of Atlanta*,[537] the court considered the question of whether plaintiffs' damage claims for trespass and nuisance, resulting from the expansion of the use of the city of Atlanta's Hartsfield International Airport, "were preempted by federal regulation of aircraft flights."[538] Defendant conceded that plaintiffs stated a case of inverse condemnation, but moved for summary judgment on the counts sounding in trespass and nuisance, basing the motion on a theory of preemption.[539] The court held that "the grant of partial summary judgment to the [defendant] on the theory that [plaintiffs'] claims . . . were barred by federal preemption must be reversed."[540]

In defining preemption the court quoted *Cooley v. Board of Wardens*:[541] "Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive *legislation* by Congress."[542] Thus, it is quite apparent that federal preemption is concerned with exclusive occupation of an area of legislation or regulation and not with any cognate area of common law remedy. The actions in *Owen* were for damages for trespass and nuisance. There was no question of competition between federal regulation of aviation and regulation of its airport by the City of Atlanta.[543] In this view, the discussion by the court of the distinction made in the famous footnote 14 of *City of*

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[536] *Id.* at 307-08.

[537] 157 Ga. App. 354, 277 S.E.2d 338 (1981), *aff'd per curiam*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 50 U.S.LW. 3916 (U.S. May 18, 1982).

[538] 277 S.E.2d at 339.

[539] *Id.*

[540] *Id.* at 341.

[541] 53 U.S. (12 How.) 299 (1851).

[542] *Id.* at 319 (emphasis added).

[543] Owen v. City of Atlanta, 277 S.E.2d 338 (1981).

Burbank v. Lockheed Air Terminal,[544] between the city as city and the city as airport owner and operator seems altogether irrelevant. The *Owen* court summarized its holding in a useful statement, shedding real light upon what was meant by preemption, as follows:

> Preemption is, in our opinion, *a doctrine which ousts a state or other government* from the exercise of its *police power* in an area in which the power of the federal government is, by law or by implications, preeminent. *Florida etc. Avocado Growers*, 373 U.S. at 141, 142 83 S.Ct. at 1216-1217 . . . . It is not a doctrine which invests an airport proprietor with impenetrable immunity from such liability as may arise from that *proprietorship*. Neither is preemption a doctrine behind which an airport proprietor whose facility creates a "nuisance" may hide, urging that its hands are tied because federal regulation has preempted all matters dealing with aircraft flights. "Nothing contained in this Chapter [the Federal Aviation Program] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies." 49 U.S.C.A. § 1506. The proprietor of an airport must bear its rightful share of the legal liability

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[544] 411 U.S. 624, 635-36 n.14 (1973). Footnote 14 states:

> The letter from the Secretary of Transportation also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport*, from issuing regulations or establishing reguirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis added.) This portion as well as quoted with approval in the Senate Report. *Ibid.*
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> Appellants and the Solicitor General submit that this indicates that a municipality with jurisdicition over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.

Id. at 635-36 n.14.

> for all the damage and loss resulting from and occasioned by its facility.[545]

Thus the position of the court may be restated as excluding from the scope of the federal preemption doctrine the rights of a person affected by the exercise of the rights provided under the preemptive federal regulation. But the question remains as to whether the Congress, having filled a field subject to the exercise of the police power in all of its manifestations, has left any room for the states to act in a way contrary to that preemption.

In *San Diego Unified Port District v. Gianturco*,[546] the court held that the federal preemption of noise control at airports, proclaimed in *City of Burbank v. Lockheed Air Terminal, Inc.*,[547] was unabated by the Quiet Communities Act of 1978,[548] and that the State of California, operating through its Department of Transportation, did not enjoy the limited privilege of regulation within that federal enclave granted to airport proprietors by footnote 14 of *City of Burbank*.[549] Thus, the court held that the stringent regulations promulgated by the Department of Transportation of California remained under injunction.[550]

The innocent-appearing, but possibly very deceptive distinction made by the Supreme Court in its famous footnote 14 in *City of Burbank v. Lockheed Air Terminal*,[551] between an ordinance-adopting city as airport and as a city proprietor was used by the court of appeals in *Santa Monica Airport Association v. City of Santa Monica*,[552] in support of its holding that airport noise ordinances adopted by the City of Santa Monica were not within a field preempted by the United

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[545] 277 S.E.2d. at 340.

[546] 651 F.2d 1306 (9th Cir. 1981).

[547] 411 U.S. 624 (1973).

[548] Pub. L. No. 95-609, 92 Stat. 3079 (1978) (codified at 42 U.S.C. §§ 4901, 4913 (1978)).

[549] 411 U.S. at 635. *See supra* note 544 and accompanying text.

[550] 651 F.2d 1306.

[551] 411 U.S. at 635. *See supra* note 544 and accompanying text.

[552] 647 F.2d 3 (9th Cir. 1981) (deleted from the bound version of the Federal Reporter at the request of the Ninth Circuit Court of Appeals).

States' comprehensive federal regulation of aviation.[553] The court concluded that "Congressional intent not to preempt all regulation by municipal proprietors is clear" and, thus, held that the Santa Monica ordinances were not preempted.[554]

In a similar vein, the court in *Joseph v. Bond*[555] held that plaintiffs, who were not the property owners at the time an easement for avigation was alleged to have been taken by the United States, could not bring an action for damages for the taking.[556] The opinion did not discuss the possibility of an assignment of the cause of action at the time of the conveyance and implied thereby that an assignment was not possible.[557]

An old comic strip character used to express his frustration from week to week with the statement, "Curses! Foiled again!"[558] Thus might the residents of South Boston, repulsed at every turn, express themselves about the opinion in *DiPerri v. Federal Aviation Administration.*[559] Their action against the FAA and the Massachusetts Port Authority for damages for a taking of their properties adjacent to Logan International Airport, occasioned by regular and frequent intrusions by airplanes and by the noise, vibration and pollution they create, was held barred by the statute of limitations set out by the Tucker Act.[560] The plaintiffs alleged that the taking of their property began in 1965 and that the action was filed fifteen years later. Similar claims against Massachusetts were held barred by the Massachusetts general statute of limitations.[561]

The court held also that plaintiffs' equal protection claims against both defendants were inappropriate because there was evidence of a legitimate governmental interest, but no evi-

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[553] *Id.*

[554] *Id.*

[555] 16 Av. Cas. 17,591 (D.D.C. 1981).

[556] *Id.*

[557] *Id.*

[558] Hanna-Barbera, Snidely Whiplash.

[559] 16 Av. Cas. 17,533 (D. Mass. 1981), *aff'd in part*, 16 Av. Cas. 18,221 (1st Cir. 1982).

[560] 28 U.S.C. § 1346 (1976) (the Act provides for a statute of limitations of six years in actions against the United States).

[561] 16 Av. Cas. 18,221, 18,222 (1st Cir. 1981).

dence of discrimination.[562] The court further held that plaintiffs failed to make a case under the Federal Tort Claims Act[563] because they had failed to exhaust their administrative remedies under that act.[564] As to the action for injunctive relief against the FAA, the court held that, to the extent the plaintiffs sought invalidation of flight pattern regulations, an injunction would not lie because of federal preemption.[565] The court added that, if the plaintiffs sought an injunction against access to the airport by aircraft not complying with noise standards of the FAA, the action should be against the State of Massachusetts as the airport operator, rather than against the FAA. Having dismissed the plaintiffs' federal claims, the court refused to exercise pendant jurisdiction over the plaintiffs' state claims.[566]

XIII. Seizure of Aircraft

The interesting question of whether a statute may constitutionally provide for the deprivation by condemnation of the property rights of a security interest holder in an airplane, because of the craft's use in the commission of a crime, was raised and answered in *State of Alaska v. Rice*.[567] Cessna was the holder of a security interest in an airplane used in the commission of a wild game offense. It moved for summary judgment in the forfeiture proceeding on the ground of violation of the due process clauses of the United States Constitution and the Constitution of the State of Alaska.[568] The court discussed the development of the law of forfeiture, stating that it reached a pinnacle in the Supreme Court case of *Calero-Toledo v. Pearson Yacht Leasing Co.*[569] In *Calero-Toledo*, the Supreme Court held that, though forfeiture was generally acceptable under the standards therein laid down, there

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[562] *Id.* (citing 16 Av. Cas 17,533-34 (D. Mass. 1981)).
[563] 28 U.S.C. §§ 2671, 2675(a) (1976).
[564] 16 Av. Cas. 17,535.
[565] *Id.*
[566] *Id.*
[567] 626 P.2d 104 (Ala. 1981).
[568] *Id.* at 107.
[569] 416 U.S. 663 (1974).

remained some exceptions to this rule. One exception occurred when forfeiture of an owner's interest was provided for by the statute, but the owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[570] In such a case the Supreme Court observed that "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[571] The Alaska court observed, however, that the purpose of the statutory forfeiture requirement, as applied to the interest of an owner who was not involved in the offense, was to induce the owner to exercise the greatest care in transferring possession of the airplane. The court therefore held that the forfeiture of Cessna's interest did not violate the federal Constitution.[572]

Nevertheless, the court found that under the Alaska Constitution it is necessary to provide a procedure for remission of the forfeiture in the case of an owner who was not involved in the commission of the offense.[573] In such a procedure the owner might show that he was not involved in the crime and that he was not negligent in transferring possession to the offender. Because the Alaska statute did not provide for such a scheme, the matter was remanded to the superior court with instructions to hold a remission hearing.[574]

In *United States v. Lockheed L-188 Aircraft*,[575] the United States seized an aircraft because the pilot/lessee violated federal aviation regulations. The United States subsequently brought a forfeiture action in the district court.[576] The owner filed a counterclaim in the suit, under the Tucker Act,[577] and attempted to amend its counterclaim by stating a cause of ac-

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[570] *Id.* at 689.
[571] *Id.* at 689-90.
[572] 626 P.2d at 112.
[573] *Id.* at 113.
[574] *Id.* at 115.
[575] 656 F.2d 390 (9th Cir. 1979).
[576] *Id.* at 393.
[577] 28 U.S.C. § 1346(a) (1976).

tion under the Federal Tort Claims Act.[578] The owner asserted that the government violated his constitutional rights by taking the airplane without due process.[579] Plaintiff argued that he was not given due process because the airplane was seized before he had notice, and because there was no pre-seizure hearing.[580] The court noted that the circuits had not decided uniformly whether a counterclaim could be brought under the Tucker Act,[581] but said that it would not decide that question because plaintiff could have raised his constitutional defense in the forfeiture proceeding. The court added that its decision did not preclude the plaintiff from bringing an *independent* action in the district court or court of claims against the United States under the Tucker Act.[582] In evaluating the FTCA claim the court held that the Act contained an exception in favor of the United States in connection with a claim for "the detention of [any] goods" by a United States officer. It therefore denied plaintiff's action.[583]

XIV. OVERBOOKING

In the latest installment of the continuing saga of *Ralph Nader v. Allegheny Airlines, Inc.*,[584] the court of appeals has held that the knowledgeable and knowing consumer advocate, who was bumped by the defendant-air carrier, was not entitled either to compensatory or punitive damages. Compensatory damages were denied on his claim of fraudulent misrepresentation against the airline because he was aware that the common practice among airlines was to overbook.[585] Punitive damages were denied on the same claim because the defendant was only doing what had been approved by the Civil Aeronautics Board (CAB), by failing to publicize to its patrons that it was engaging in the practice of deliberate

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[578] 28 U.S.C. § 1346(b) (1976).
[579] 656 F.2d at 393, 397.
[580] *Id.* at 394.
[581] *Id.* at 396.
[582] *Id.* at 397 (emphasis added).
[583] *Id.*
[584] 626 F.2d 1031 (D.C. Cir. 1980).
[585] *Id.* at 1034.

overbooking.[586]

XV. MISCELLANY

In *Nevada Airlines v. Bond*,[587] the cause of action arose when the operating certificate of Nevada Airlines was revoked under an emergency revocation order of the Federal Aviation Administrator, who cited numerous violations of federal aviation regulations by the commuter carrier.[588] Nevada Airlines brought the action in the United States District Court seeking an injunction against enforcement of the emergency revocation order pending appeal of the order to the NTSB. The district court dismissed plaintiff's suit for injunction on the ground that it lacked jurisdiction.[589] The court of appeals agreed. The court of appeals asserted that, notwithstanding the availability of further administrative proceedings for a review of the revocation order, it had jurisdiction under § 1006(a) of the Federal Aviation Act of 1958[590] to review any order of the Federal Aviation Administrator issued by the administrator under his statutory powers.[591] The emergency order of revocation was such an order. The court of appeals then went on to hold that this jurisdiction was exclusive and that the district court lacked jurisdiction to entertain the injunctive action.[592] The court held, finally, that there was no showing by the plaintiff sufficient to upset the administrator's determination by demonstrating that the administrator acted arbitrarily or capriciously.[593]

In *Greater Tampa Chamber of Commerce v. Goldschmidt*,[594] a challenge to an executive agreement between the United States and the United Kingdom, by which air travel between the two countries is regulated, was dismissed for lack

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[586] *Id.*
[587] 622 F.2d 1017 (9th Cir. 1980).
[588] *Id.* at 1019.
[589] *Id.* at 1018.
[590] 49 U.S.C. § 1486(a) (1976).
[591] 622 F.2d at 1019.
[592] *Id.* at 1020.
[593] *Id.* at 1021.
[594] 627 F.2d 258 (D.C. Cir. 1980).

of standing.[595] The Greater Tampa Chamber of Commerce and other groups and individuals who used international air service alleged that the renegotiation of the Bermuda Agreement of 1946 (Bermuda I)[596] was "anti-competitive" to air service.[597] Under Bermuda I, no bilateral restrictions were imposed on the number of airlines which could fly from a "gateway."[598] Under the new agreement (Bermuda II),[599] however, the United Kingdom was allowed to limit thirteen gateways to nonstop service by only one American carrier, and to limit two gateways to nonstop service by two American carriers.

Specifically, the plaintiffs cited four "procedural" flaws in the agreement.[600] First, since Bermuda II conflicted with those sections of the Federal Aviation Act of 1958, mandating competition in air transportation,[601] it was argued to be a treaty, because only treaties override acts of Congress; therefore it required Senate approval which it had not received.[602]

Second, since 22 U.S.C. § 901(c) permits the President to confer the personal rank of ambassador only for special, limited and temporary missions, and since this was not such a mission, Alan S. Boyd's appointment as the chief negotiator should have been submitted to the Senate for confirmation.[603] Third, the Secretary of Transportation did not adequately consult with the Civil Aeronautics Board while Bermuda II was being negotiated.[604] Finally, neither Mr. Boyd nor Secre-

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[595] *Id.* at 259.

[596] United States-United Kingdom Air Services Agreement, *signed* at Bermuda, February 11, 1946, on 60 Stat. 1499, T.I.A.S. No. 1507.

[597] 627 F.2d at 260.

[598] *Id.* Gateways are cities from which nonstop flights may travel to the United Kingdom. *Id.*

[599] United States-United Kingdom Air Services Agreement, *signed* at Bermuda, July 23, 1977, T.I.A.S. No. 8641.

[600] 627 F.2d at 260.

[601] 49 U.S.C. §§ 1301, 1302(a)(4) (1976).

[602] 627 F.2d at 260.

[603] *Id.* at 261.

[604] 49 U.S.C. § 1462 (1976) provides that:

> The Secretary of State shall advise the Secretary of Transportation, the [Civil Aeronautics] Board, and the Secretary of Commerce, and consult with the Secretary of Transportation, Board, or Secretary of Commerce as appropriate, concerning the negotiations of any agree-

tary of Transportation Brock Adams was properly authorized to sign Bermuda II for the United States.[605] The district court issued a memorandum order and concluded that plaintiffs had standing because they were injured by a diminution in air services. The court, however, granted summary judgment to defendants as to plaintiffs' first and fourth allegations, and granted their motion to dismiss the other allegations as nonjusticiable "political questions."[606]

The Court of Appeals remanded the case, with instructions to dismiss the complaint for lack of standing, citing the Supreme Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization.*[607] The Supreme Court in *Simon* held that Simon failed to show that the court could redress the injury averred. "Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation."[608]

In *Greater Tampa,* were the Senate to approve the agreement, plaintiffs' circumstances would be exactly what they were when they filed the complaint. Second, even if the Senate declined to approve the agreement, there remains the fact that the United Kingdom completely controlled landing rights within its boundaries. Therefore, absent a substantial likelihood that a federal court could redress the injury plaintiffs claimed to have suffered, the plaintiffs had no standing to invoke the power of a federal court.[609]

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ment with foreign governments for the establishment or development of air navigation, including air routes and services.

[605] 627 F.2d at 261.

[606] *Id.*

[607] 426 U.S. 26 (1976).

[608] *Id.* at 38.

[609] 627 F.2d at 264-65.